SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 67

PAUL THEODORE CHEFF, PETITIONER,

vs.

ELMER J. SCHNACKENBERG, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., DECEMBER 17, 1965

[fol. 1]

BEFORE FEDERAL TRADE COMMISSION

Commissioners:

John W. Gwynne, Chairman
Robert T. Secrest
Sigurd Anderson
William C. Kern
Edward T. Tait

Docket No. 6203

In the Matter of

HOLLAND FURNACE COMPANY, a corporation.

FINAL ORDER—Issued July 7, 1958

Respondent having filed an appeal from the initial decision of the hearing examiner in this proceeding; and the matter having been heard by the Commission on the whole record, including briefs and oral argument; and the Commission having rendered its decision denying respondent's appeal and adopting the initial decision as the decision of the Commission:

It Is Ordered that respondent Holland Furnace Company shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist contained in the initial decision.

By the Commission, Commissioner Kern not participating.

Robert M. Parrish, Secretary.

Seal

* * * * * * *

[fol. 2]

Order

It Is Ordered that respondent Holland Furnace Company, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of furnaces, heating equipment, or parts therefor, do forthwith cease and desist from:

(1) Representing, directly or indirectly that any of its employees are inspectors or are employees or representatives of government agencies or of gas or utility companies.

(2) Representing, contrary to fact, that its salesmen or servicemen are heating engineers.

[fol. 3] (3) Representing that any furnace manufactured by a competitor is defective or not repairable, or that the continued use of such furnace will result in asphyxiation, carbon monoxide poisoning, fires, or other damage, or that the manufacturer of such furnace is out of business, or that parts of such furnace are unobtainable, unless such are the facts.

(4) Tearing down or dismantling any furnace without the permission of the owner.

(5) Representing that a furnace which has been dismantled cannot be reassembled and used without danger of asphyxiation, gas poisoning, fires, or other damage, or for any other reason, when such is not a fact.

(6) Requiring the owner of any furnace which has been dismantled by respondent's employees to sign a release absolving the respondent of liability for its employees' negligence, or of any other liability, before reassembling said furnace.

(7) Refusing to immediately reassemble, at the request of the owner, any furnace which has been dismantled by respondent's employees.

[fol. 4] (8) Misrepresenting in any manner the condition of any furnace which has been dismantled by respondent's employees.

James A. Purcell, Hearing Examiner.

October 22, 1957
Washington, D. C.

[fol. 5]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 12451

HOLLAND FURNACE COMPANY, Petitioner,

vs.

FEDERAL TRADE COMMISSION, Respondent.

ORDER—August 5, 1959

On Petition to Review and Set Aside an Order of the Federal Trade Commission

This case came on for consideration on respondent's motion for an order commanding petitioner Holland Furnace Company to obey and comply with the order to cease and desist entered against it by respondent Federal Trade Commission on July 7, 1958, unless and until said order shall be set aside upon review by this Court or by the Supreme Court of the United States, and upon petitioner's answer to said motion.

Upon consideration whereof it is the judgment of this Court that issuance of the order prayed for is necessary

to prevent injury to the public and to petitioner's competitors pendente lite; wherefore it is

Ordered that respondent's aforesaid motion be, and it hereby is, granted, and it is

Ordered that petitioner be, and it hereby is, commanded forthwith to obey and comply with the order to cease and desist entered against it on July 7, 1958, in a proceeding before respondent entitled "In the Matter of Holland Furnace Company, a corporation, Docket No. 6203," until and unless said order to cease and desist shall be set aside upon review by this Court or by the Supreme Court of the United States, or until further order of this Court.

Elmer J. Schnackenberg, Judge.
John S. Hastings, Judge.
Fred L. Wham, Judge.

[fol. 6]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

13671

In Re

HOLLAND FURNACE COMPANY.

Present:

Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

ORDER TO SHOW CAUSE—April 26, 1963

Upon the verified petition of the attorneys appointed herein to prosecute on behalf of the Court, requesting this Court to institute herein prosecutions of Paul Theodore

Cheff, Katherine Nyestrom Cheff, Edgar P. Landwehr, John D. Ames, Ralph Boalt, Robert H. Trenkamp, George Spatta, Alvin W. Klomparens, Richard J. Koerner, Henry Weyenberg, and Jay A. Wabeke, for criminal contempts of this Court, it is

Ordered that each of the aforenamed individuals, on or before the 25 day of June, 1963, file a verified answer to the said petition for institution of prosecutions for criminal contempts and for adjudication in and punishment for such criminal contempts filed on the 19 day of April, 1963, by the said attorneys appointed to prosecute on behalf of the Court, each of said answers to show cause, if any there be, why the individual filing the same should not be adjudged in criminal contempt of this Court, and punished [fol. 7] for such criminal contempt, by reason of having knowingly, wilfully and intentionally caused, and aided and abetted in causing, respondent Holland Furnace Company to violate and disobey, and fail and refuse to comply with, an order of this Court entered on August 5, 1959, in Cause No. 12451, entitled on the records of this Court "Holland Furnace Company, Petitioner, v. Federal Trade Commission, Respondent," all as appears from the said petition of the attorneys appointed to prosecute on behalf of the Court; and it is

Further Ordered that a copy of this Order to Show Cause, together with a copy of the said petition and all attachments thereto, a copy of the order of this Court appointing the said attorneys to prosecute herein on behalf of the Court, a copy of the prosecution's motion herein for a finding of guilty against respondent Holland Furnace Company, and a copy of the prosecution's memorandum brief in support of said motion, be served by a United States Marshal upon each of the aforenamed individuals on or before the 26 day of May, 1963, and that a return of such service be filed with the Clerk of this Court.

[fol. 8]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

13,671

In Re

HOLLAND FURNACE COMPANY.

Present:

Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

ORDER APPOINTING ATTORNEYS—April 26, 1963

The attorneys appointed herein to prosecute respondent Holland Furnace Company for criminal contempt of this Court having filed a petition requesting the Court to institute additional criminal contempt prosecutions of Paul Theodore Cheff, Katherine Nyestrom Cheff, Edgar P. Landwehr, John D. Ames, Ralph Boalt, Robert H. Trenkamp, George Spatta, Alvin W. Klomparens, Richard J. Koerner, Henry Weyenberg, and Jay A. Wabeke, by reason of their having knowingly, wilfully and intentionally caused, and aided and abetted in causing, respondent Holland Furnace Company to violate and disobey, and fail and refuse to comply with, an order of this Court entered on August 5, 1959, in Cause No. 12451, entitled on the records [fol. 9] of this Court, "Holland Furnace Company, Petitioner, v. Federal Trade Commission, Respondent," and the Court having considered the request, it is

Ordered that J. B. Truly, Assistant General Counsel, and E. K. Elkins and Miles J. Brown, Attorneys of the Federal Trade Commission, the attorneys heretofore ap-

pointed to prosecute on behalf of this Court the respondent Holland Furnace Company for criminal contempt of this Court, be, and they hereby are, appointed also to prosecute on behalf of this Court the aforenamed individuals for criminal contempts of this Court.

[fol. 10]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 13671

In Re

HOLLAND FURNACE COMPANY.

PETITION FOR INSTITUTION HEREIN OF PROSECUTIONS OF ADDITIONAL RESPONDENTS FOR CRIMINAL CONTEMPTS AND FOR ADJUDICATION IN AND PUNISHMENT FOR SUCH CRIMINAL CONTEMPTS

To the Honorable, the Judges of the United States Court of Appeals for the Seventh Circuit:

Come Now the attorneys appointed herein to prosecute on behalf of the Court, and respectfully petition the Court to institute, pursuant to Section 401(3) of Title 18 of the United States Code, and in conformity with Rule 42(b) of the Rules of Criminal Procedure for the United States District Courts, prosecutions of Paul Theodore Cheff, Katherine Nyestrom (Mrs. Paul Theodore) Cheff, Edgar P. Landwehr, John D. Ames, Ralph Boalt, Robert H. Trenkamp, George Spatta, Alvin W. Klomparens, Richard J. Koerner, Henry Weyenberg, and Jay A. Wabeke, for criminal contempts of this Court, and to adjudge them to be in and punish them for such criminal contempts, by reason of their jointly and severally having knowingly, wilfully and intentionally caused, and aided and abetted in

[fol. 11] causing, the Holland Furnace Company, hereinafter called "respondent," to violate, disobey, and fail and refuse to comply with, an order of this Court entered on August 5, 1959; and in support thereof the attorneys appointed to prosecute on behalf of the Court respectfully show the Court the following facts:

• • • • • • •

[fol. 12] G. Paul Theodore Cheff, Katherine Nyestrom Cheff, Edgar P. Landwehr, John D. Ames, Ralph Boalt, Robert H. Trenkamp, George Spatta, Alvin W. Klomparens, Richard J. Koerner, Henry Weyenberg, and Jay A. Wabeke, acting jointly and severally, have knowingly, wilfully and intentionally caused, and aided and abetted in causing, respondent's aforesaid violations of the said order of this Court, and respondent's aforesaid commission thereby of criminal contempts of this Court and of its lawful authority, in that:

(1) they, and each of them, had full notice and knowledge of the long-established use by respondent, and by its agents, representatives and employees in its behalf, of the methods, acts, and practices prohibited by the said order of this court, and—

(2) they, and each of them, in their several capacities as officials, officers, directors, and controlling stockholders of respondent, had, jointly and severally, and knew that they had, the authority and the power to take effective action to stop and to prevent henceforth such use, and—

[fol. 13] (3) they, and each of them, had full notice and knowledge that such use would continue unless effective action to stop such use and to prevent it thenceforth was taken by them in their several capacities as officials, officers, directors, and controlling stockholders of respondent, despite which—

(4) they, and each of them, (a) took no action reasonably effective to, or reasonably designed or intended to,

stop such use and to prevent it thenceforth, but instead (b) made no change in the sales methods and policies of respondent which had conduced to such use before the said order was issued and which continued to conduce to said use thereafter, (c) retained, defended, awarded, and promoted agents, representatives and employees of respondent who were known to them to have used the forbidden methods, acts and practices, and (d) thereby, and by other additional means and actions, encouraged, condoned and fostered such continued use by respondent. and by its agents, representatives and employees in its behalf, of the methods, acts, and practices prohibited by the said order of this Court.

H. Paul Theodore Cheff, Katherine Nyestrom Cheff, Edgar P. Landwehr, John D. Ames, Ralph Boalt, Robert H. Trenkamp, George Spatta, Henry Weyenberg, and Jay A. Wabeke, and each of them, in knowingly, wilfully and intentionally causing, and aiding and abetting in causing, [fol. 14] respondent to violate and disobey, and to fail and refuse to comply with, the said order of this Court, during the period from August 5, 1959, until December 31, 1961, and thereby to commit criminal contempt of this Court and of its lawful authority, have jointly and severally, thereby, and by all and each of respondent's aforesaid violations and contempts committed during said period, committed criminal contempt of this Court and of its lawful authority.

* * * * * * *

[fol. 15]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 13671

In Re

HOLLAND FURNACE COMPANY.

VERIFIED ANSWER OF PAUL THEODORE CHEFF TO ORDER TO SHOW CAUSE

State of Michigan
County of Ottawa

Paul Theodore Cheff, upon oath deposes and states that he did not knowingly, willfully or intentionally, cause, and/or aid or abet in causing Holland Furnace Company to violate and disobey, and fail and refuse to comply with, an order of the United States Court of Appeals for the Seventh Circuit entered on August 5, 1959, in Cause No. 12451, entitled on the records of said Court "Holland Furnace Company, Petitioner, v. Federal Trade Commission, Respondent," as set forth in the petition for institution of prosecutions for criminal contempts filed with said Court in the instant cause on April 19, 1963.

Your respondent hereby requests a complete trial on the said issues.

Paul Theodore Cheff

Subscribed and sworn to before me this 23rd day of August, 1963.

Esther Bareman, Notary Public, Ottawa County, Mich., My Commission Expires 9-28-65.

Certificate of Service (omitted in printing).

[fol. 16]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Petition for Criminal Contempt

No. 3671

In Re: HOLLAND FURNACE COMPANY, et al.

Before:

Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

ORDER—October 9, 1963

By agreement of counsel for the court and counsel for Respondents Paul Theodore Cheff, Katherine Nyestrom Cheff, Edgar P. Landwehr and Alvin W. Klomparens.

It Is Ordered that said Respondents shall file with this court, on or before November 8, 1963, an election of trial by jury or a waiver of a jury trial.

[fol. 17]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 13671

In Re

HOLLAND FURNACE COMPANY.

DEMAND FOR JURY TRIAL—Filed November 8, 1963

Now Come the Respondents, Paul Theodore Cheff, Katherine Nyestrom Cheff and Edgar P. Landwehr. by their

attorneys, Hyman B. Raskin and Robert J. Downing, and at this time request and demand a jury trial on the issues involved in the instant matter.

Paul Theodore Cheff, Katherine Nyestrom Cheff and Edgar P. Landwehr, By Hyman B. Raskin, Robert J. Downing.

Certificate of Service (omitted in printing).

[Stamped—U.S.C.A.—7th Circuit—Filed May 26 1964—Nunc pro tunc as of Nov. 8, 1963—Kenneth J. Carrick, Clerk]

[File endorsement omitted]

[fol. 18]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 13671

In Re

HOLLAND FURNACE COMPANY, et al.
(PAUL THEODORE CHEFF)

PROSECUTION'S REPLY TO ANSWER OF RESPONDENT PAUL THEODORE CHEFF—Filed December 7, 1963

Come Now the attorneys appointed to prosecute on behalf of the Court, and by way of Reply to the Answer filed herein on August 26, 1963, by respondent Paul Theodore Cheff, respectfully advise the Court that said respondent has by said Answer denied each and all of the allegations of the petition filed herein by Court-appointed counsel on April 19, 1963, and otherwise has reserved his defense, and that in the view of Court-appointed counsel the evidence

[File endorsement omitted]

indicated, in said petition and in other documents herein, to be available with respect to this respondent is sufficient in fact and in law to establish that he has committed a criminal contempt of this Court as charged in said petition.

Wherefore the attorneys appointed to prosecute on behalf of the Court pray that the Court (1) now determine that respondent Paul Theodore Cheff, having been afforded [fol. 19] the opportunity to make preliminary showing why he should not be adjudged in criminal contempt of this Court as charged in the petition filed herein on April 19, 1963, by Court-appointed counsel, has not so shown, and (2) that the Court, after such further proceedings as it determines to be just and appropriate in the circumstances, adjudge respondent Paul Theodore Cheff in criminal contempt of this Court, and punish him for such criminal contempt in such manner as this Court deems just and proper.

Respectfully submitted.

J. B. Truly, E. K. Elkins, Miles J. Brown, Attorneys appointed to prosecute on behalf of the Court.

Dated: December 5, 1963.

[fol. 20] *Duly sworn to by E. K. Elkins, jurat omitted in printing.*

[fol. 21]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Petition for Criminal Contempt

No. 13671

In Re: HOLLAND FURNACE COMPANY, et al.

Before:

Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

ORDER DENYING DEMAND FOR JURY TRIAL, ETC.
—May 27, 1964

The court has considered the demand for trial by jury on the issues involved herein filed on May 26, 1964, *nunc pro tunc* as of November 8, 1963, by respondents Paul Theodore Cheff, Katherine Nyestrom Cheff and Edgar P. Landwehr, as well as the waiver of jury trial filed by respondent Alvin W. Klomparens on May 26, 1964, *nunc pro tunc* as of November 8, 1963, and the court determines that none of said respondents is entitled to a trial by jury on the matters involved in the proceeding at bar, and therefore, It Is Ordered that said demand for jury trial be denied and said waiver of jury trial be stricken.

[fol. 22]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1964—JANUARY SESSION, 1965

No. 13671

In Re: HOLLAND FURNACE COMPANY, et al.

JANUARY 27, 1965

Before Schnackenberg, Kiley and Swygert, Circuit Judges.

This criminal contempt proceeding was begun on petition of the Federal Trade Commission alleging that respondents "knowingly, wilfully and intentionally" violated and disobeyed an order of this court of August 5, 1959, directed against respondents, by failing and refusing to comply with said order. The Rules to Show Cause issued. Issues were joined by respondents' answers, and this court, without a jury,[1] heard evidence and arguments on the issues.

In the August 5, 1959 order of this court, respondents were "commanded forthwith to obey and comply" with an FTC order, entered July 7, 1958, "until and unless," the Commission order "shall be set aside upon review by this court or the United States Supreme Court, or until further order of this court."

[fol. 23] The Commission order of July 7, 1958 was entered at the conclusion of hearings of proceedings against Holland Furnace Company charging unfair methods of competition and deceptive acts and practices in commerce.

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[1] Following the Supreme Court's decision in *United States* v. *Barnett*, 376 U.S. 681 (1964), this court denied motions of certain respondents for jury trial.

The order directed "respondent Holland Furnace Company, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device" in selling or distributing Holland products or services, to cease and desist from:

(1) Representing, directly or indirectly, that any of its employees are inspectors or are employees or representatives of government agencies or of gas or utility companies.

(2) Representing, contrary to fact, that its salesmen or servicemen are heating engineers.

(3) Representing that any furnace manufactured by a competitor is defective or no' repairable or that the continued use of such furnace will result in asphyxiation, carbon monoxide poisoning, fires, or other damage, or for any other reason, when such is not a fact.

(4) Tearing down or dismantling any furnace without the permission of the owner.

(5) Representing that a furnace which has been dismantled cannot be reassembled and used without danger of asphyxiation, gas poisoning, fires, or other damage, or for any other reason, when such is not a fact.

(6) Requiring the owner of any furnace which has been dismantled by respondent's employees to sign a release absolving the respondent of liability for its employees' negligence, or of any other liability, before reassembling said furnace.

(7) Refusing to immediately reassemble, at the request of the owner, any furnace which has been dismantled by respondent's employees.

(8) Misrepresenting in any manner the condition of any furnace which has been dismantled by respondent's employees.

The Commission's order, as enforced by this court's August 5, 1959 order, remained in full force and effect [fol. 24] and was made permanent by this court's affirmance of the Commission's order on November 7, 1961. *Holland Furnace Co.* v. *FTC*, 295 F.2d 302 (1961). The contempt charges before us cover the period from August 5, 1959 to the entry of the final judgment by this court.

Certain respondents made requests for findings of facts "specially," under Rule 23(c), and for "special findings." [2] The court, in lieu of making the "special findings" requested, makes its own findings of fact and conclusions of law on the record and transcript of evidence as follows:

I.

Holland Furnace Company is a Delaware corporation with principal offices in Holland, Michigan. From April, 1946 to May, 1962 respondent Paul T. Cheff was Holland's president and chairman of its board of directors, owning 6,004 shares of stock. His wife, Katherine Nystrom Cheff, respondent, was a director from March, 1935 to May, 1962, and owned 43,004 shares of stock. Her nephew, respondent Edgar P. Landwehr, was a director from April, 1945 to May, 1962, and owner of 24,410 shares of Holland stock. Respondents John D. Ames, Ralph Boalt, Robert H. Trenkamp, and George Spatta were directors, respectively, from April, 1954 to June, 1961, from April, 1953 to May, 1962, from April, 1953 to July, 1962, and from April, 1951 to February, 1962. Ames owned 200 shares, Boalt 200 shares, Spatta 500-1000 shares, and Trenkamp 200 shares of Holland stock.

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[2] "That, if any or all of the above-named respondents is held to have been in contempt of this Court's order of August 5, 1959, this Court make special findings of fact as to the conduct, events, and circumstances upon which such contempt conviction is based, including findings as to the conduct, events, and circumstances underlying any finding of a violation of that order by any other respondent in this proceeding, including the Holland Furnace Company, if such a violation is an element in the finding that any or all of the above-named respondents has been in contempt."

Respondent Alvin W. Klomparens was vice president and sales manager from April, 1956 to March, 1960. Richard J. Koerner, respondent, succeeded Klomparens as sales manager, from April, 1960 to April, 1961, and was also vice president from April, 1961 to June, 1962. Respondent Henry Weyenberg was production manager and chief engineer of Holland from April, 1959 to April, [fol. 25] 1960 and vice president after 1960. Jay A. Wabeke, respondent, was manager of Holland's Product Service Department from the time of its creation in September, 1959.

The parties to this proceeding stipulated that 164 "attachments" to the contempt petitions, 132 attachments to Holland's answer, and two attachments to the Commission's reply to Holland's answer "may be" received in evidence and be considered by this court as if affiants were witnesses; and that this court "may resolve" any conflicts in the affidavits and determine credibility of affiants. No concessions were made in the stipulation as to truth or falsity of the statements therein and as to whether respondents had power or authority over the "facts" stated in the affidavits or any responsibility for any alleged violations asserted therein. The parties waived right of confrontation of witnesses and right of cross-examination.

In its answer to the petition for contempt, Holland Furnace Company admits that the conduct of its employees in fifteen transactions, involving twenty-five separate violations, involving the following customers of Holland, violated the August 5, 1959 order of this court:

ALLEN, Atlanta, Georgia
BIBEAU, Spokane, Washington
CLAYMANN, Seattle, Washington
CONDON, Denver, Colorado
EHRICH, Albert Lea, Minnesota
EWING, Peabody, Massachusetts
GRUMLING, Mansfield, Ohio
HENDRICKSON, Albert Lea, Minnesota

HOOKER, San Francisco, California
NIELSEN, Chicago, Illinois
SHELLABARGER, Akron, Ohio
STEWART, Seattle, Washington
TAYLOR, Cuyahoga Falls, Ohio
THOMPSON, Cuyahoga Falls, Ohio
WINK, Spokane, Washington

In addition, the testimony shows that the Attorney General of Minnesota brought an action against Holland for unfair and deceptive practices by its employees, and [fol. 26] several attorneys general in other states contemplated or threatened similar action. This testimony and the fifteen admitted instances of twenty-five violations by respondent Holland Furnace Company of this court's order of August 5, 1959 represent, exemplify and illustrate the contempt of this court's order during the entire period covered by petition, throughout the entire territory in which respondent Holland Furnace Company operates, according to a regular and usual method by which the corporate respondent has in that period and in that territory sold and offered for sale its furnaces, heating equipment, and parts therefor.

We are convinced beyond a reasonable doubt, on the basis of the entire record, that Holland Furnace Company, acting through certain of its officers, agents, representatives and employees, through a "regular and usual" sales practice of its employees in commerce has "knowingly, wilfully and intentionally" violated and disobeyed in one or more instances each of the prohibitions of the August 5, 1959 order of this court; and accordingly we find the Holland Furnace Company guilty of criminal contempt of this court.

II.

We are convinced beyond a reasonable doubt, on the evidence in this case, that respondent Paul T. Cheff is guilty of "knowingly, wilfully and intentionally" causing

and aiding and abetting in causing, in one or more instances, violations by Holland Furnace Company of each of the eight prohibitions in the August 5, 1959 order of this court.

There is abundant evidence from which we find that Cheff was the dominant head of Holland Furnace Company in the period during which the Holland sales practices subject of the Commission's cease and desist order occurred; that he was the dominant head of Holland when the Commission's hearings were conducted, when the cease and desist order issued, when the August 5, 1959 order of this court was entered, and thereafter until May, 1962; that he was well aware of the condemned sales practices and of the prohibitions in the order of this court; that following the entry of the order Cheff made no bona fide attempt to comply or achieve compliance with the order; [fol. 27] that on the contrary he pursued a course of conduct designed to construct an apparent compliance with the order and to devise a defense against charges of violation; that he established the Product Service Department, not to "discipline" the Holland organization or bring about compliance with this court's order, but as a facade behind which to continue the condemned sales practices; that his appointment of Wabeke to head the department was in furtherance of Cheff's plan to make no substantial change in Holland's sales practices since he could not help but know that Wabeke would not be effective in investigating complaints and disciplining the sales force; that Cheff had no intention of permitting Wabeke to be effective; that he frustrated Wabeke's sincere attempts to accomplish compliance with this court's order by telling Wabeke he had complete authority to discharge salesmen while telling others that Wabeke could only "recommend" discharge; that in the Holland Furnace Company house organ, the "Firepot," Cheff complained of recommendations to discharge salesmen, and that with the knowledge and approval of Cheff, salesmen whom Wabeke had recommended discharging

were praised in the publication; that Cheff's occasional meetings with division sales managers, without Wabeke, at which he read from extensive notes to the eight or so in attendance, were apparent rather than real attempts to comply with this court's order; that instead of traveling to meet with Better Business Bureaus in various parts of the country to adjust serious complaints, he sent Wabeke and Weyenberg, neither of whom was suited to the purpose; that Cheff did not himself go out into the field to meet with branch managers or salesmen, or with Wabeke, to induce compliance with the order, and did not take pains to see that his entire sales organization understood the seriousness of compliance, as did his successors in management by bringing 2,000 salesmen to Holland, Michigan; that his bulletin, "The policy we work by," purporting to bring about compliance with the court's order, carefully avoided the word "discharge" and purposely avoided mentioning restraint on unauthorized dismantling of furnaces—that the bulletin was ineffective to influence radical changes in Holland's sales policy, even if, and there is doubt of this, it reached the salesmen; and that Cheff's design in his relations with directors, employees or customers was to in-[fol. 28] sulate Holland and himself from compliance with this court's order and from guilt for non-compliance.

Cheff made no substantial change after August 5, 1959 in Holland's sales practices or in the fundamental structure underlying the practices. Holland's policy remained the same: working on the replacement of furnaces instead of the original furnace market, operating on a straight commission basis with salesmen, and higher prices for Holland furnaces than its competitors, and realizing profit only on sales of furnaces, not on repairs or cleaning. The loose sales hierarchy, with tenuous relationship between Cheff and the sales managers, between them and the division sales managers, and between them and the branch managers, remained as it had been. Cheff remained aloof from the sales managers, division managers and salesmen. All this contributed to a condition which lent itself to undis-

ciplined sales practices. Moreover, Cheff's unbending attitude toward the Commission's cease and desist order and his confidence in eventually setting it aside were an obstruction to change and to compliance with the court's order.

III.

Alvin W. Klomparens was employed by Holland in 1937, and served as sales manager and vice president from April, 1956 until April, 1960. He was succeeded by Richard J. Koerner, who was employed in 1948, and was a division sales manager when he was appointed by Cheff as sales manager to succeed Klomparens. After Koerner served in that position for one year, Cheff appointed him also a vice president.

We are convinced beyond a reasonable doubt, by the evidence in this record, that respondents Klomparens and Koerner aided and abetted in causing the proven violations of this court's order of August 5, 1959 during the respective periods of time each served as sales manager.

Both of these respondents were well aware of Holland's sales practices, of the proceedings before the Federal Trade Commission, and of the August 5, 1959 order of this court. The oral and documentary proof has convinced us beyond a reasonable doubt that each of these respondents willingly lent himself to Cheff's program of maintaining the sales [fol. 29] practices which were prohibited by this court's order. They not only aided and abetted Cheff's design by disregarding what obligation the office of sales manager imposed on them in view of the order of this court, but they aided and abetted the violation of that order in an affirmative way. Klomparens edited the "Firepot," and requested, wrote and approved articles directed at the sales force with the intention of neutralizing any attempt by Wabeke's Product Service Department to bring about compliance. And Koerner, after his appointment as sales manager, wrote division sales managers that only he and Cheff had power to discharge and that sales managers must fight

"obstacles" such as the Product Service Department and the Better Business Bureaus.

IV.

We find that the evidence does not prove beyond a reasonable doubt that Henry Weyenberg and Jay A. Wabeke caused or aided and abetted in causing respondent Holland Furnace Company to violate and disobey, and fail and refuse to comply with, the order of this court. They have not committed criminal contempts of this court and of its lawful authority.

During the period covered by the contempt citation herein, respondents Weyenberg and Wabeke had no real or effective power or authority over or responsibility for the sales operations of the company or the actions of its agents, representatives, and employees in connection with the offering for sale, sale, and distribution of its products and services, and no real or effective power or authority over or responsibility for the selection, employment, promotion, demotion, transfer, removal, or discharge of those agents, representatives and employees.

V.

We find the record shows that directors John D. Ames, Ralph Boalt, George Spatta, and Robert H. Trenkamp were grossly negligent in failing to perform fully their duties as directors of Holland Furnace Company and in relying upon Cheff's assurances that this court's order was not being violated or disobeyed. The gross negligence in this case does not, however, constitute criminal contempt. [fol. 30] Trenkamp's position, as attorney for Holland during and after the proceedings before the Commission, imposed upon him a special responsibility, in addition to that which he had as director. It is questionable, to say the least, whether this professional responsibility was discharged by Trenkamp in a manner that reflected fully an awareness of this added responsibility.

There is no justification upon testimony in the hearing and the facts stated in their answers to the petition, which we are taking as true, to infer that these respondents did anything affirmatively or positively to cause or to aid and abet in causing violations of this court's order. We have a reasonable doubt that they knowingly, wilfully and intentionally caused or aided and abetted in causing respondent Holland Furnace Company to violate the order. We find that the evidence does not prove beyond a reasonable doubt that directors Ames, Boalt, Spatta, and Trenkamp are guilty of the criminal contempt charged against them. The rule to show cause as to them is discharged.

What we have said in the next preceding paragraph about the above-named four directors applies equally to Katherine Nystrom Cheff and Edgar P. Landwehr, who filed no answers. The record is virtually silent as to them, and justifies only the inference that they were grossly negligent in their duties. It does not justify an inference that they knowingly, wilfully and intentionally caused or aided and abetted in causing the violation of this court's order. The rule to show cause as to them is discharged.

[fol. 31]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before

Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

No. 13671

In re: HOLLAND FURNACE COMPANY

Petition for Criminal Contempt.

JUDGMENT ORDER—January 27, 1965

This cause having come on to be heard in open court on the petition of the Federal Trade Commission, filed March 19, 1962, and the order to show cause as prayed in said petition, which order was issued March 19, 1962, and which order directed Holland Furnace Company to answer said petition and to show cause, if any there be, why it should not be adjudged in criminal contempt of this court, and punished for such criminal contempt, by reason of having knowingly, wilfully and intentionally violated and disobeyed, and failed and refused to comply with an order of this court entered on August 5, 1959, in Cause No. 12451, entitled on the records of this court "Holland Furnace Company, Petitioner v. Federal Trade Commission, Respondent," all as appear from the said petition of the Federal [fol. 32] Trade Commission, and the answer of Holland Furnace Company filed August 15, 1962, and its further answer filed November 27, 1962, a reply to said answer and further answer filed April 18, 1963 by the prosecutors ap-

[File endorsement omitted]

pointed by this court, together with said prosecutors' motion for a finding that Holland Furnace Company has committed criminal contempt of this court and that the court adjudge punishment accordingly, as well as the answer of Holland filed September 30, 1963; and

This cause also having been heard on the verified petition filed April 19, 1963 by the attorneys appointed to prosecute on behalf of the court, which petition named as additional respondents herein Paul Theodore Cheff, Katherine Nystrom Cheff, Edgar P. Landwehr, John D. Ames, Ralph Boalt, Robert H. Trenkamp, George Spatta, Alvin W. Klomparens, Richard J. Koerner, Henry Weyenberg and Jay A. Wabeke; and the answer of said additional respondents filed herein, including the amendments to answer and a supplemental answer, the prosecution's replies to all of said respondents' answers, and the court having reserved its ruling on the motions of respondents Wabeke and Weyenberg that the order to show cause be discharged as to them; and

The court having heard and considered the evidence offered in open court in support of the petitions and the evidence offered by various respondents, and the cause having been submitted to the court thereon, and the court having considered the motions of the various respondents for a discharge of the rule to show cause and having considered [fol. 33] the various briefs and memoranda of law filed by counsel representing all respondents and said prosecutor, and the court having this day filed a written opinion which makes findings of fact in this case;

The court finds that, as to the respondents Wabeke and Weyenberg, it has not been proved by evidence beyond a reasonable doubt that they knowingly, wilfully and intentionally caused, or aided and abetted in causing respondent Holland Furnace Company to violate, disobey and fail and refuse to comply with said order of this court entered on August 5, 1959.

As to respondent Katherine Nystrom Cheff, the court finds that it has not been proved by evidence beyond a reasonable doubt that she knowingly, wilfully and intentionally caused, or aided and abetted in causing respondent Holland Furnace Company to violate, disobey and fail and refuse to comply with said order of this court entered on August 5, 1959.

As to the respondents Edgar P. Landwehr, John D. Ames, Ralph Boalt, Robert H. Trenkamp and George Spatta, the court finds that it has not been proved by evidence beyond a reasonable doubt that they knowingly, wilfully and intentionally caused, or aided and abetted in causing respondent Holland Furnace Company to violate and disobey, and fail and refuse to comply with said order of this court entered on August 5, 1959.

It Is Therefore Ordered that said rule to show cause is hereby discharged as to said Henry Weyenberg, Jay A. [fol. 34] Wabeke, Katherine Nystrom Cheff, Edgar P. Landwehr, John D. Ames, Ralph Boalt, Robert H. Trenkamp and George Spatta.

And having considered the evidence offered in open court and the admissions made in the answer of respondent Holland Furnace Company, the court finds that it has been proved beyond a reasonable doubt that said respondent knowingly, wilfully and intentionally violated, disobeyed, failed and refused to comply with said order of this court entered on August 5, 1959; that, as to respondents Paul Theodore Sheff, Alvin W. Klomparens and Richard J. Koerner, the court finds that it has been proved beyond a reasonable doubt that they and each of them knowingly, wilfully and intentionally caused, and aided and abetted in causing, the aforesaid violations by Holland Furnace Company of the said order of this court, entered on August 5, 1959; and said Company and Cheff, Klomparens and Koerner have thereby committed criminal contempt of this court and of its lawful authority.

It Is, Therefore, Ordered that said Holland Furnace Company, Paul Theodore Cheff, Alvin W. Klomparens and

Richard J. Koerner be and they are hereby each adjudged in criminal contempt of this court, by reason whereof the court imposes a fine on said Holland Furnace Company of One Hundred Thousand Dollars and costs to be taxed by the clerk of this court, payable forthwith, and that execution issue therefor; and also by reason whereof the court sentences Paul Theodore Cheff to imprisonment for a period of six months and he is ordered committed to the [fol. 35] custody of the Attorney General of the United States or his authorized representative for imprisonment for said period of six months; and also by reason whereof the court sentences the respondents Alvin W. Klomparens and Richard J. Koerner each to pay a fine of Five Hundred Dollars forthwith, and in default of payment of said fine each is to stand committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment until said fine be paid or until otherwise discharged as provided by law, said fines and costs to be payable to the clerk of this court, either in United States currency or a bank's certified check.

It Is Ordered that the clerk deliver a certified copy of this judgment order and commitment to the United States marshal and that the said copy serve as the commitment of those respondents subject to committal as aforesaid.

[fol. 36]

SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—February 15, 1965

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including April 12th, 1965.

Tom Clark, Associate Justice of the Supreme Court of the United States

Dated this 15th day of February, 1965.

[fol. 37]

SUPREME COURT OF THE UNITED STATES

No. 67—October Term, 1965

PAUL THEODORE CHEFF, Petitioner,

v.

ELMER J. SCHNACKENBERG, et al.

ORDER ALLOWING CERTIORARI—November 15, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted limited to Question 3 presented by the petition which reads as follows:

"3. Whether, after denial of a demand for a jury trial, the sentence of imprisonment of six months imposed upon petitioner is constitutionally permissible under Article III and the Sixth Amendment."

The case is placed on the summary calendar and set for argument immediately following No. 442.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 67

In re PAUL THEODORE CHEFF, PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RICHARD M. KECK
THOMAS W. JOHNSTON
JOSEPH V. GIFFIN
135 South LaSalle Street
Chicago, Illinois 60603

Counsel for Petitioner

Of Counsel:

CHADWELL, KECK, KAYSER,
RUGGLES & MCLAREN
135 South LaSalle Street
Chicago, Illinois 60603

April 1965

TWENTIETH CENTURY PRESS, INC., CHICAGO 60606

INDEX

CITATIONS

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.

In re PAUL THEODORE CHEFF, PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Paul Theodore Cheff, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on January 27, 1965, finding petitioner guilty of criminal contempt and imposing upon him a sentence of imprisonment of six months.

OPINION BELOW

The opinion of the Court of Appeals issued January 27, 1965, is unreported, as yet, and is printed in Appendix B, *infra*, pp. 18-28. The judgment order of the Court of Appeals entered January 27, 1965, is printed in Appendix C, *infra*, pp. 29-32. The order of the Court of Appeals entered August 5, 1959, and the cease and desist order of the Federal Trade Commission (hereinafter called FTC) issued July 7, 1958, are printed in Appendix D, *infra*, at p. 33 and pp. 34-35, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on January 27, 1965 (Appendix C, *infra*, pp. 29-32). Peti-

tioner's timely motion, requesting that this judgment be vacated and that either a judgment of acquittal be entered or a new trial be ordered (Env. 7, Item 230),[1] was denied by the Court of Appeals on February 11, 1965 (Env. 7, Item 235). This Court, on February 15, 1965, extended the time for filing a petition for writ of certiorari to and including April 12, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether convicting petitioner of criminal contempt, based on his failure, as a corporate officer, to take certain affirmative actions neither expressly nor impliedly required by a narrowly-drawn, prohibitory court order is in violation of the right of fair warning guaranteed by the Due Process Clause of the Fifth Amendment.

2. Whether petitioner's conviction of criminal contempt

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[1] All record documents, including the transcript of testimony, have been placed in envelopes numbered 1 through 12 in order according to the item number assigned by the Clerk of the Court of Appeals which appears on the cover page of each document. All original exhibits received in evidence, except for certain stipulated exhibits which are attached to the pleadings of the prosecution and the Holland Furnace Company, are in two additional envelopes numbered 13 and 14.

The following abbreviations are used herein in citing to the record:

Env.	Envelope
Tr. Vol.	Transcript Volume
CX	Exhibit of Petitioner Cheff
PX	Prosecution Exhibit
H.A., Att.....(SX)....	Holland Furnace Company Answer, Attachment ..... (Stipulated Exhibit)

was an abuse of the Court of Appeals' contempt power since based upon a record devoid of substantial evidence from which petitioner could be found guilty beyond a reasonable doubt.

3. Whether, after denial of a demand for jury trial, the sentence of imprisonment of six months imposed upon petitioner is constitutionally permissible under Article III and the Sixth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution involved are Article III and the Fifth and Sixth Amendments. The statutory provision involved is 18 U.S.C. § 401(3). The pertinent parts of these provisions are set forth in Appendix A, *infra*, p. 17.

STATEMENT OF THE CASE

In this case, petitioner was found guilty of criminal contempt and sentenced to imprisonment for a period of six months by the Court of Appeals for the Seventh Circuit for wilfully causing violations of a pendente lite order of that court enforcing a cease and desist order of the FTC.

On July 7, 1958, in an administrative proceeding entitled "In the Matter of Holland Furnace Company, a corporation, Docket No. 6203," the FTC entered an order commanding said corporation "and its officers, agents, representatives, and employees," in connection with the sale of furnaces and heating equipment in commerce, to cease and desist from eight specified practices found to constitute unfair methods of competition under the Federal Trade Commission Act (Appendix D, *infra*, pp. 34-35).

Thereafter, in the course of a proceeding initiated by the Holland Furnace Company (hereinafter sometimes called Holland) to review the FTC cease and desist order, the Court of Appeals for the Seventh Circuit, on application of the FTC, entered a pendente lite order on August 5, 1959, commanding the Holland Furnace Company to comply with the cease and desist order "until and unless said order . . . be set aside . . . or until further order of . . . [the] Court" (Appendix D, *infra*, p. 33).[2] Petitioner was not a party to the FTC proceedings or to the review proceedings in the Court of Appeals nor was he named in the court's pendente lite enforcement order. Both the FTC cease and desist order and the court's order enforcing the same were limited to prohibiting eight deceptive sales practices and neither contained any provision specifying what steps or affirmative actions were required to be taken by the company or its executives to prevent violations (Appendix D, *infra*, pp. 34-35).

On petition of the FTC filed pursuant to 18 U.S.C. § 401(3) and in conformity with Rule 42(b) of the Federal Rules of Criminal Procedure, the Court of Appeals, on April 26, 1963, issued a rule to show cause against petitioner (who, during the relevant period, had been a director, president and chief executive officer of Holland) and against six other directors and four other Holland executives; each of these persons was required to show cause why he should not be held in criminal contempt

> "by reason of having knowingly, wilfully and intentionally caused, and aided and abetted in causing, respondent Holland Furnace Company to violate and disobey, and fail and refuse to comply with . . . [the

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[2]. On November 7, 1961, the pendente lite order was made permenent by the Court of Appeals' affirmance of the FTC order. *Holland Furnace Co.* v. *FTC*, 295 F.2d 302 (7th Cir. 1961).

pendente lite order of the court] entered on August 5, 1959 . . ." (Env. 5, Item 27).[3]

Also on April 26, 1963, an order was entered appointing counsel for the FTC as attorneys to prosecute the proceeding on behalf of the court (Env. 5, Item 28).

Petitioner filed a verified answer to the rule to show cause denying that he had knowingly, wilfully or intentionally caused and aided and abetted in causing Holland Furnace Company to violate and fail and refuse to comply with the court's order of August 5, 1959 (Env. 5, Item 93).

Petitioner also filed a demand for trial by jury (Env. 6, Item 156), which demand was denied by order of the court entered on May 27, 1964 (Env. 6, Item 157).

The proceeding was tried by the Court of Appeals which heard evidence. On January 27, 1965, the court rendered an opinion (Appendix B, *infra*, pp. 18-28), and entered a judgment order: (1) finding that petitioner "knowingly, wilfully and intentionally caused, and aided and abetted in causing . . . violations by Holland Furnace Company" of the court's order of August 5, 1959; (2) adjudging him guilty of criminal contempt; and (3) sentencing him "to imprisonment for a period of six months. . . ." (Appendix C, *infra*, pp. 31-32).[4]

REASONS FOR GRANTING WRIT

This case raises important questions concerning the exercise by federal courts of the power to prosecute and

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[3] On petition of the FTC, the Court of Appeals had previously issued a rule to show cause against Holland Furnace Company on March 19, 1962 (Env. 2, Item 2).

[4] All other individual respondents were found not guilty except two former sales managers who were fined $500 each. Holland Furnace Company was found guilty and fined $100,000 and is seeking review in this Court by petition for certiorari filed March 10, 1965, No. 972.

punish for criminal contempt. The decision of the court below is in conflict with the decision of the Court of Appeals for the Ninth Circuit in *In re Floersheim,* 316 F.2d 423 (9th Cir. 1963) and contravenes the first essential of due process—the right of fair warning. Additional important questions are raised by the absence of any substantial evidence from which the Court of Appeals could find petitioner guilty beyond a reasonable doubt, and the length of the prison sentence imposed without a trial by jury. All of these questions deserve review by this Court in the exercise of its supervisory power over the administration of criminal justice in the federal courts.[5]

I.

The Decision of the Court Below Is In Conflict With a Decision of the Court of Appeals For the Ninth Circuit, and Petitioner's Conviction Is In Violation of the Right of Fair Warning

The order of August 5, 1959, on which this contempt proceeding was based did no more than enforce the provisions of the FTC cease and desist order, review of which was then pending in the Court of Appeals. The FTC order specified absolutely no affirmative action to be taken by

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[5] This is particularly so since the trial court disregarded specifically guaranteed procedural safeguards, and petitioner has no right of appellate review. Thus, the court below declined to make special findings of fact as petitioner had requested in a motion filed pursuant to Rule 23(c) of the Federal Rules of Criminal Procedure (Appendix B, *infra,* p. 20; Env. 7, Item 203). Moreover, petitioner was not afforded an opportunity to make a statement in his own behalf before sentence was imposed as is required by Criminal Rule 32(a) (Env. 11, Tr. Vol. 22, p. 2620).

Petitioner has no right of appeal since this proceeding originated in the Court of Appeals.

Holland or any of its executives but instead was limited to prohibiting eight specific deceptive sales practices (Appendix D, *infra*, pp. 34-35).

Petitioner's conviction was not based upon a charge or evidence that he personally engaged in any of the eight deceptive practices. Rather, the alleged direct violations of the eight prohibitions covered by the order arose out of actions by subordinate sales employees. These alleged violations involved but a few of Holland's thousands of employees in connection with some 66 out of millions of house calls made throughout the United States during the period of approximately 28 months that the pendente lite order was in effect (Env. 2, Item 14, H.A., Att. 55 (SX); Env. 10, Tr. Vol. 13, pp. 1519-20).

Further, petitioner was not convicted for having taken no action whatsoever to prevent violations by these subordinate sales employes. Indeed, the abundance of undisputed record evidence establishing the creation and execution of a program to bring about compliance and to control the practices of subordinate employees precluded any such contention. The following are some of the affirmative actions that were taken by petitioner and other Holland executives:

A special department, the Product Service Department, was set up to police sales practices (Env. 10, Tr. Vol. 14, pp. 1574-83; Env. 14, CX 8, 9, 23).

Numerous bulletins and directives were issued commanding compliance (Env. 2, Item 14, H.A., Att. 31, 32, 34, 35, 36, 37 (SX); Env. 10, Tr. Vol. 14, pp. 1606-08, 1641-54; Env. 14, CX 8, 10-B, 11, 12, 16, 17, 25, 26, 34, 35, 36).

Monthly meetings were held with division sales personnel at which the necessity for compliance was continually stressed (Env. 10, Tr. Vol. 14, pp. 1623-40,

1659-60; Tr. Vol. 15, pp. 1667-75; Tr. Vol. 16, pp. 1833-38; Env. 14, CX 20, 23, 24, 40, 41).

Many salesmen were discharged or demoted for engaging in the prohibited practices (Env. 2, Item 14, H.A., Att. 33 (SX); Env. 10, Tr. Vol. 16, pp. 1806-09, 1901; Env. 13, PX 87, 90; Env. 14, CX 5, 6, 7, 14, 16, 31, 32, 33).

Meetings were held with officials of various Better Business Bureaus both at the local and national level (Env. 10, Tr. Vol. 14, pp. 1569-70; Env. 14, CX 23).

Meetings were held with attorneys from the FTC at which compliance suggestions and information concerning complaints were requested but not provided (Env. 8, Tr. Vol. 1, pp. 100-01, 104-06; Tr. Vol. 2, pp. 162-64; Env. 10, Tr. Vol. 14, pp. 1568-69; Env. 14, CX 23).

The Court of Appeals, however, dismissed these actions as a "facade" and as "apparent" rather than real efforts to comply (conclusions which we shall show are totally unsupported by the evidence, see pp. 12-13, *infra*) and proceeded to find petitioner guilty of knowingly, wilfully and intentionally *causing* violations by subordinate employees by reason of his failure to change certain sales *policies* of Holland. But the unchanged policies upon which the court below relied involve such matters as selling products in the replacement market, compensating salesmen on a commission basis, the pricing of equipment, repairs and services, and Holland's corporate marketing structure,[6] and are entirely separate, distinct and different from the deceptive sales practices inhibited by the court order. The FTC order as enforced by the court in no way touched upon or required any change in these policies. Had the FTC or the

[6] The court below catalogued these unchanged policies in paragraph 3 of Section II of its opinion (Appendix B, *infra*, p. 25.)

court considered changes in these policies to be essential to effect compliance, provisions requiring such action could have been incorporated in the orders. *FTC* v. *National Lead Co.*, 352 U.S. 419, 430 (1957). But such was not done.

The holding of the court below, since bottomed upon a failure by petitioner to change sales policies not within the ambit of the order, is squarely in conflict with the decision of the Court of Appeals for the Ninth Circuit in *In re Floersheim*, 316 F.2d. 423 (9th Cir. 1963). That was a proceeding for criminal contempt of an order of the Court of Appeals enforcing an FTC cease and desist order prohibiting the use of certain deceptive types of skip trace forms. It was contended by the FTC that the forms used by the respondent were too "official looking" or "too demanding," that the color of paper used resembled that of checks and that the use of a Washington, D.C. address implied government involvement. The court rejected such contentions as a basis for a contempt conviction saying:

> "The short answer to these complaints is that the cease and desist order, as drawn, does not forbid such acts or use." 316 F.2d at 428.

Furthermore, petitioner has been convicted for failing to take affirmative action not even *impliedly* required by the prohibitions of the court order. Petitioner does not contend that a prohibitory order places no affirmative duties on corporate officers or that a criminal contempt conviction may not be based upon a failure of such officers to take action designed to prevent violations by subordinates. However, where, as here, a contempt conviction is based upon inaction so far removed from the provisions of the prohibitory order that the officer has no reason even to suspect that such action is required, it flies in the face of the right to

fair warning guaranteed by the Due Process Clause of the Fifth Amendment.

It is fundamental that no man should be held criminally responsible for conduct which he could not understand to be proscribed or required. *United States* v. *Harriss*, 347 U.S. 612, 617 (1954). Based on this principle, criminal statutes so vague and indefinite that men of ordinary intelligence must guess at their meaning and differ as to their application have been struck down as violative of "the first essential of due process of law." *Connally* v. *General Const. Co.*, 269 U.S. 385, 391 (1926). And the right of fair notice is violated to an even greater extent where a statute precise on its face "has been unforeseeably and retroactively expanded by judicial construction. . . ." *Bouie* v. *City of Columbia*, 378 U.S. 347, 352 (1964); *accord*, *Pierce* v. *United States*, 314 U.S. 306, 310-11 (1941).

Petitioner's conviction was based on just such an unforeseen and retroactive expansion by judicial construction, not of a statute but of a court order.[7] This is not a case where the order in question was merely vague. Rather, the order on its face was specific. It was limited to prohibiting eight deceptive sales practices. But the court below has read into it requirements of affirmative action relating to matters which no business executive could be expected to understand were within its scope. For example, we submit that petitioner could not reasonably have been expected to construe the order as requiring a change in a long-standing

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[7] The requirements of due process, of which fair warning is one, are clearly applicable to a proceeding for criminal contempt. *Levine* v. *United States*, 362 U.S. 610, 616 (1960). Accordingly, the principle laid down in the *Bouie* and *Pierce* cases, *supra*, with respect to construing a criminal *statute* applies with equal force to proscribe an unforeseeable and retroactive expansion by judicial construction of a *court order*.

practice of paying salesmen on a commission basis or as calling for a reduction in the selling prices of heating equipment.

It is respectfully submitted that petitioner's conviction, since squarely in conflict with the *Floersheim* case, *supra,* and since predicated upon an unforeseeable and *ex post facto* expansion of the narrow requirements of the court order in violation of the constitutional right of fair warning, warrants review by certiorari.

II.

There is No Substantial Evidence From Which to Find Petitioner Guilty Beyond Reasonable Doubt

The evidence in this record is manifestly insufficient to support the Court of Appeals' finding that petitioner knowingly, wilfully and intentionally caused and aided and abetted in causing violations of its pendente lite enforcement order. Indeed, we believe the record is so devoid of proof as to make petitioner's conviction a denial of due process under the teaching of *Thompson* v. *City of Louisville,* 362 U.S. 199 (1960). In any event, the record evidence falls far short of proving guilt beyond a reasonable doubt, the standard applicable in a criminal contempt proceeding. *Michaelson* v. *United States,* 266 U.S. 42, 66 (1924); *Gompers* v. *Bucks Stove & Range Co.,* 221 U.S. 418, 444 (1911).

Under the contempt charges brought against petitioner, it was incumbent upon the prosecution to introduce evidence sufficient to prove beyond a reasonable doubt:

(1) That there were violations of the court's order by subordinate employees of Holland Furnace Company;

(2) That petitioner acted "knowingly, wilfully and intentionally," *i.e.* with a *specific intent* to cause violations of the order; and

(3) That petitioner's knowing, wilfull and intentional conduct *actually caused* violations of the court order by subordinate sales employees.

Assuming there is some evidence to prove that subordinate sales employees did violate the order, there is simply no evidence whatsoever that petitioner acted with the requisite specific intent, or that his conduct was the cause in fact of such violations.

Specific Intent—The Court of Appeals, in the *first* paragraph of Section II of its opinion, reached the ultimate conclusion that petitioner was guilty of *knowingly, wilfully* and *intentionally* causing violations of the order, based upon a pyramid of subordinate conclusions contained in the *second* paragraph of Section II (Appendix B, *infra*, pp. 23-25). The net of these subordinate conclusions is that petitioner's actions to set up and carry out a compliance program were not bona fide but were designed to construct "an apparent compliance" and a "facade behind which to continue the condemned sales practices" (Appendix B, *infra*, pp. 23, 24). Since the record is wholly barren of any evidence showing that petitioner's actions were not undertaken and carried out in entire good faith, the ultimate conclusion respecting wilfulness (specific intent) is totally unfounded.

There is no direct evidence that petitioner's compliance efforts were part of a plan to erect a "facade" behind which violations could occur; moreover, the circumstances referred to by the court provide no basis for *inferring* the existence of any such scheme for two reasons.

First, many of the specified circumstances are themselves completely lacking in evidentiary support, and, indeed, some are precisely contrary to the record evidence. For example, the court's findings that petitioner, in the Holland house organ, the "Firepot," "complained of recommendations to discharge salesmen," and that with peti-

tioner's "knowledge and approval . . . salesmen whom Wabeke had recommended discharging were praised in the publication" (Appendix B, *infra*, p. 24) are completely unsupported.

Second, the remaining circumstances cited by the court are not rationally related to the conclusion sought to be inferred. For instance, the fact that petitioner personally did not meet with Better Business Bureaus to adjust complaints, or travel into the field to discuss compliance with company personnel, but, instead, delegated these duties to others (Appendix B, *infra*, p. 24), certainly does not permit an inference that he had a plan to construct a mere apparent compliance with the order.[8] And since there is no basis for inferring the existence of a sham compliance plan, such a normal business policy as delegating to other executives the responsibility for effectuating a compliance program certainly cannot be labeled as a lawful act done pursuant to an unlawful purpose.

It thus appears that the ultimate holding that petitioner *knowingly, wilfully* and *intentionally* caused violations of the order was based both upon subordinate conclusions having no evidentiary basis and which the court apparently fashioned entirely out of whole cloth, and upon inferences "so dogmatic . . . as to be wholly unwarranted." *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 251 (1957) (concurring opinion of Frankfurter, J.). Accordingly, there is a complete absence of any evidentiary predicate sufficient to establish the requisite specific intent.

Causation—The findings of the Court of Appeals on the element of causation are contained in the third paragraph

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[8] Petitioner, the chief executive officer of Holland, was responsible for all aspects of the operations of a company with some 400 branches in 41 states, with annual sales of 25 to 30 million dollars, and with some 7,000-8,000 employees, and hence obviously had to delegate many compliance duties to others.

of Section II of the opinion (Appendix B, *infra*, p. 25). The substance of the court's holding is that petitioner's failure to make substantial changes in Holland's sales policies and sales organization "contributed to a condition which lent itself to undisciplined sales practices," and that his unbending attitude toward the FTC cease and desist order and his confidence in eventually setting it aside constituted "an obstruction to change and to compliance with the court's order" (Appendix B, *infra*, p. 25). From the foregoing, the Court of Appeals inferred the ultimate conclusion that petitioner knowingly, wilfully and intentionally *caused* violations of the order.

The record is equally deficient on this essential element. Again, the findings with respect to many of the circumstances referred to in the opinion are themselves entirely unsupported. Thus, the court's ambiguous reference to petitioner's "unbending attitude toward the . . . cease and desist order" (Appendix B, *infra*, p. 25) has no evidentiary basis, and the reference to his confidence "in eventually setting . . . [the order] aside " (*ibid.*) is precisely contrary to the testimony and documentary exhibits (Env. 11, Tr. Vol. 18, pp. 2114-15; Env. 14, CX 7).

Further, there is not one word of testimony or one document in this record to support directly or inferentially that any failure by petitioner to make policy changes or his attutude toward the order *caused* a single proven violation of the order. Of equal importance is the fact that none of the sales policies and other matters relied upon by the Court of Appeals were required to be changed or were covered in any way by the FTC order as enforced by the court's order, and the same cannot constitutionally be construed by judicial ruling to be within the ambit of such orders for the reasons discussed at pp. 6-11, *supra*.

Neither due process nor the requirement of proof beyond a reasonable doubt is satisfied when a conviction is

based on a record so totally lacking in evidence to establish the essential elements of specific intent and causation. We respectfully submit that petitioner's conviction on this record constitutes a clear abuse of the contempt power and calls for review on certiorari by this Court.

III.

The Sentence of Imprisonment Imposed Upon Petitioner Raises a Constitutional Question Similar to One Now Pending Before This Court

A further question presented by this case is whether a sentence of imprisonment of six months may constitutionally be imposed upon petitioner in view of the fact that his demand for a jury trial was denied (Env. 6, Item 157). The majority opinion in *United States* v. *Barnett,* 376 U.S. 681 (1964) indicated that absent a trial by jury, the punishment that may be imposed for criminal contempt "would be constitutionally limited to that penalty provided for petty offenses." 376 U.S. at 695 n.12. In a dissenting opinion, the punishment limitations were equated to "trivial penalties." 376 U.S. at 751, 757 & n.44 (opinion of Goldberg, J.). The question of whether a six month prison sentence is within this undefined limitation remains open.

A similar issue is pending before this Court in *Harris* v. *United States, cert. granted,* 379 U.S. 944 (1964) (No. 526). Question 3 in *Harris* involves whether a "sentence of one year's imprisonment imposed . . . in a summary contempt proceeding is constitutionally permissible." Brief for Petitioner, p. 2.

We respectfully submit that the sentence imposed upon petitioner, absent a jury trial, raises a constitutional question under Article III and the Sixth Amendment which is equal in importance to the one in *Harris.* Accordingly, this Court should grant certiorari to resolve such question.

CONCLUSION

It is undisputed that the contempt power is peculiarly subject to abuse. The offense not only has "the most ill-defined and elastic contours in our law" but in addition is punished by judges who have concentrated in themselves "the responsibilities of lawmaker, prosecutor, judge, jury and disciplinarian. . . ." *Green* v. *United States*, 356 U.S. 165, 199, 200 (1958) (dissenting opinion of Black, J.).

Moreover, where the proceeding originates in a Court of Appeals with the consequent absence of any right of appeal, the harshness of the contempt power is even more pronounced. Due process does not require appellate review; however, we submit that in view of the unusual susceptibility of the contempt power to abuse—as suggested by the important questions presented and discussed above—the unavailability of appellate review should be given some independent significance in determining whether to grant certiorari.

For all of the reasons set forth in this petition, we urge that a writ of certiorari be issued.

Respectfully submitted,

RICHARD M. KECK
THOMAS W. JOHNSTON
JOSEPH V. GIFFIN
135 South LaSalle Street
Chicago, Illinois 60603

Counsel for Petitioner

Of Counsel:

CHADWELL, KECK, KAYSER,
RUGGLES & MCLAREN
135 South LaSalle Street
Chicago, Illinois 60603

April 1965

APPENDIX A

Constitutional Provisions Involved

Article III, § 2, Par. 3 provides in pertinent part:

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed. . . ."

The Fifth Amendment provides in pertinent part:

> "No person . . . shall . . . in any criminal case . . . be deprived of life, liberty, or property, without due process of law. . . ."

The Sixth Amendment provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

Statutory Provision Involved

18 U.S.C. § 401(3) provides:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> • • • • •
>
> "(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1964 — JANUARY SESSION, 1965

No. 13671
In re: HOLLAND FURNACE COMPANY, et al.

[Filed] JANUARY 27, 1965

Before SCHNACKENBERG, KILEY and SWYGERT, *Circuit Judges.*

This criminal contempt proceeding was begun on petition of the Federal Trade Commission alleging that respondents "knowingly, wilfully and intentionally" violated and disobeyed an order of this court of August 5, 1959, directed against respondents, by failing and refusing to comply with said order. The Rules to Show Cause issued. Issues were joined by respondents' answers, and this court, without a jury,[1] heard evidence and arguments on the issues.

In the August 5, 1959 order of this court, respondents were "commanded forthwith to obey and comply" with an FTC order, entered July 7, 1958, "until and unless," the Commission order "shall be set aside upon review by this court or the United States Supreme Court, or until further order of this court."

[1] Following the Supreme Court's decision in *United States* v. *Barnett*, 376 U.S. 681 (1964), this court denied motions of certain respondents for jury trial.

The Commission order of July 7, 1958 was entered at the conclusion of hearings of proceedings against Holland Furnace Company charging unfair methods of competition and deceptive acts and practices in commerce. The order directed "respondent Holland Furance Company, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device" in selling or distributing Holland products or services, to cease and desist from:

(1) Representing, directly or indirectly, that any of its employees are inspectors or are employees or representatives of government agencies or of gas or utility companies.

(2) Representing, contrary to fact, that its salesmen or servicemen are heating engineers.

(3) Representing that any furnace manufactured by a competitor is defective or not repairable or that the continued use of such furnace will result in asphyxiation, carbon monoxide poisoning, fires, or other damage, or for any other reason, when such is not a fact.

(4) Tearing down or dismantling any furnace without the permission of the owner.

(5) Representing that a furnace which has been dismantled cannot be reassembled and used without danger of asphyxiation, gas poisoning, fires, or other damage, or for any other reason, when such is not a fact.

(6) Requiring the owner of any furnace which has been dismantled by respondent's employees to sign a release absolving the respondent of liability for its employees' negligence, or of any other liability, before reassembling said furnace.

(7) Refusing to immediately reassemble, at the request of

the owner, any furnace which has been dismantled by respondent's employees.

(8) Misrepresenting in any manner the condition of any furnace which has been dismantled by respondent's employees.

The Commission's order, as enforced by this court's August 5, 1959 order, remained in full force and effect and was made permanent by this court's affirmance of the Commission's order on November 7, 1961. *Holland Furnace Co.* v. *FTC*, 295 F.2d 302 (1961). The contempt charges before us cover the period from August 5, 1959 to the entry of the final judgment by this court.

Certain respondents made requests for findings of facts "specially," under Rule 23(c), and for "special findings."[2] The court, in lieu of making the "special findings" requested, makes its own findings of fact and conclusions of law on the record and transcript of evidence as follows:

I.

Holland Furnace Company is a Delaware corporation with principal offices in Holland, Michigan. From April, 1946 to May, 1962 respondent Paul T. Cheff was Holland's president and chairman of its board of directors, owning 6,004 shares of stock. His wife, Katherine Nystrom Cheff, respondent, was a director from March, 1935 to May, 1962,

---

[2] "That, if any or all of the above-named respondents is held to have been in contempt of this Court's order of August 5, 1959, this Court make special findings of fact as to the conduct, events, and circumstances upon which such contempt conviction is based, including findings as to the conduct, events, and circumstances underlying any finding of a violation of that order by any other respondent in this proceeding, including the Holland Furnace Company, if such a violation is an element in the finding that any or all of the above-named respondents has been in contempt."

and owned 43,004 shares of stock. Her nephew, respondent Edgar P. Landwehr, was a director from April, 1945 to May, 1962, and owner of 24,410 shares of Holland stock. Respondents John D. Ames, Ralph Boalt, Robert H. Trenkamp, and George Spatta were directors, respectively, from April, 1954 to June, 1961, from April, 1953 to May, 1962, from April, 1953 to July, 1962, and from April, 1951 to February, 1962. Ames owned 200 shares, Boalt 200 shares, Spatta 500-1000 shares, and Trenkamp 200 shares of Holland stock.

Respondent Alvin W. Klomparens was vice president and sales manager from April, 1956 to March, 1960. Richard J. Koerner, respondent, succeeded Klomparens as sales manager, from April, 1960 to April, 1961, and was also vice president from April, 1961 to June, 1962. Respondent Henry Weyenberg was production manager and chief engineer of Holland from April, 1959 to April, 1960 and vice president after 1960. Jay A. Wabeke, respondent, was manager of Holland's Product Service Department from the time of its creation in September, 1959.

The parties to this proceeding stipulated that 164 "attachments" to the contempt petitions, 132 attachments to Holland's answer, and two attachments to the Commission's reply to Holland's answer "may be" received in evidence and be considered by this court as if affiants were witnesses; and that this court "may resolve" any conflicts in the affidavits and determine credibility of affiants. No concessions were made in the stipulation as to truth or falsity of the statements therein and as to whether respondents had power or authority over the "facts" stated in the affidavits or any responsibility for any alleged violations asserted therein. The parties waived right of confrontation of witnesses and right of cross-examination.

In its answer to the petition for contempt, Holland Fur-

nace Company admits that the conduct of its employees in fifteen transactions, involving twenty-five separate violations, involving the following customers of Holland, violated the August 5, 1959 order of this court:

ALLEN, Atlanta, Georgia
BIBEAU, Spokane, Washington
CLAYMANN, Seattle, Washington
CONDON, Denver, Colorado
EHRICH, Albert Lea, Minnesota
EWING, Peabody, Massachusetts
GRUMLING, Mansfield, Ohio
HENDRICKSON, Albert Lea, Minnesota
HOOKER, San Francisco, California
NIELSEN, Chicago, Illinois
SHELLABARGER, Akron, Ohio
STEWART, Seattle, Washington
TAYLOR, Cuyahoga Falls, Ohio
THOMPSON, Cuyahoga Falls, Ohio
WINK, Spokane, Washington

In addition, the testimony shows that the Attorney General of Minnesota brought an action against Holland for unfair and deceptive practices by its employees, and several attorneys general in other states contemplated or threatened similar action. This testimony and the fifteen admitted instances of twenty-five violations by respondent Holland Furnace Company of this court's order of August 5, 1959 represent, exemplify and illustrate the contempt of this court's order during the entire period covered by petition, throughout the entire territory in which respondent Holland Furnace Company operates, according to a regular and usual method by which the corporate respondent has in that period and in that territory sold and offered for sale its furnaces, heating equipment, and parts therefor.

We are convinced beyond a reasonable doubt, on the basis of the entire record, that Holland Furnace Company, acting through certain of its officers, agents, representatives and employees, through a "regular and usual" sales practice of its employees in commerce has "knowingly, wilfully and intentionally" violated and disobeyed in one or more instances each of the prohibitions of the August 5, 1959 order of this court; and accordingly we find the Holland Furnace Company guilty of criminal contempt of this court.

II.

We are convinced beyond a reasonable doubt, on the evidence in this case, that respondent Paul T. Cheff is guilty of "knowingly, wilfully and intentionally" causing and aiding and abetting in causing, in one or more instances, violations by Holland Furnace Company of each of the eight prohibitions in the August 5, 1959 order of this court.

There is abundant evidence from which we find that Cheff was the dominant head of Holland Furnace Company in the period during which the Holland sales practices subject of the Commission's cease and desist order occurred; that he was the dominant head of Holland when the Commission's hearings were conducted, when the cease and desist order issued, when the August 5, 1959 order of this court was entered, and thereafter until May, 1962; that he was well aware of the condemned sales practices and of the prohibitions in the order of this court; that following the entry of the order Cheff made no bona fide attempt to comply or achieve compliance with the order; that on the contrary he pursued a course of conduct designed to construct an apparent compliance with the order and to devise a defense against charges of violation; that he established the Product Service Department, not to

"discipline" the Holland organization or bring about compliance with this court's order, but as a facade behind which to continue the condemned sales practices; that his appointment of Wabeke to head the department was in furtherance of Cheff's plan to make no substantial change in Holland's sales practices since he could not help but know that Wabeke would not be effective in investigating complaints and disciplining the sales force; that Cheff had no intention of permitting Wabeke to be effective; that he frustrated Wabeke's since attempts to accomplish compliance with this court's order by telling Wabeke he had complete authority to discharge salesmen while telling others that Wabeke could only "recommend" discharge; that in the Holland Furnace Company house organ, the "Firepot," Cheff complained of recommendations to discharge salesmen, and that with the knowledge and approval of Cheff, salesmen whom Wabeke had recommended discharging were praised in the publication; that Cheff's occasional meetings with division sales managers, without Wabeke, at which he read from extensive notes to the eight or so in attendance, were apparent rather than real attempts to comply with this court's order; that instead of traveling to meet with Better Business Bureaus in various parts of the country to adjust serious complaints, he sent Wabeke and Weyenberg, neither of whom was suited to the purpose; that Cheff did not himself go out into the field to meet with branch managers or salesmen, or with Wabeke, to induce compliance with the order, and did not take pains to see that his entire sales organization understood the seriousness of compliance, as did his successors in management by bringing 2,000 salesmen to Holland, Michigan; that his bulletin, "The policy we work by," purporting to bring about compliance with the court's order, carefully avoided the word "discharge" and purposely avoided mentioning restraint on unauthorized dismantling of furnaces—that the bulletin was ineffective

to influence radical changes in Holland's sales policy, even if, and there is doubt of this, it reached the salesmen; and that Cheff's design in his relations with directors, employees or customers was to insulate Holland and himself from compliance with this court's order and from guilt for non-compliance.

Cheff made no substantial change after August 5, 1959 in Holland's sales practices or in the fundamental structure underlying the practices. Holland's policy remained the same: working on the replacement of furnaces instead of the original furnace market, operating on a straight commission basis with salesmen, and higher prices for Holland furnaces than its competitors, and realizing profit only on sales of furnaces, not on repairs or cleaning. The loose sales hierarchy, with tenuous relationship between Cheff and the sales managers, between them and the division sales managers, and between them and the branch managers, remained as it had been. Cheff remained aloof from the sales managers, division managers and salesmen. All this contributed to a condition which lent itself to undisciplined sales practices. Moreover, Cheff's unbending attitude toward the Commission's cease and desist order and his confidence in eventually setting it aside were an obstruction to change and to compliance with the court's order.

III.

Alvin W. Klomparens was employed by Holland in 1937, and served as sales manager and vice president from April, 1956 until April, 1960. He was succeeded by Richard J. Koerner, who was employed in 1948, and was a division sales manager when he was appointed by Cheff as sales manager to succeed Klomparens. After Koerner served in that position for one year, Cheff appointed him also a vice president.

We are convinced beyond a reasonable doubt, by the evidence in this record, that respondents Klomparens and Koerner aided and abetted in causing the proven violations of this court's order of August 5, 1959 during the respective periods of time each served as sales manager.

Both of these respondents were well aware of Holland's sales practices, of the proceedings before the Federal Trade Commission, and of the August 5, 1959 order of this court. The oral and documentary proof has convinced us beyond a reasonable doubt that each of these respondents willingly lent himself to Cheff's program of maintaining the sales practices which were prohibited by this court's order. They not only aided and abetted Cheff's design by disregarding what obligation the office of sales manager imposed on them in view of the order of this court, but they aided and abetted the violation of that order in an affirmative way. Klomparens edited the "Firepot," and requested, wrote and approved articles directed at the sales force with the intention of neutralizing any attempt by Wabeke's Product Service Department to bring about compliance. And Koerner, after his appointment as sales manager, wrote division sales managers that only he and Cheff had power to discharge and that sales managers must fight "obstacles" such as the Product Service Department and the Better Business Bureaus.

IV.

We find that the evidence does not prove beyond a reasonable doubt that Henry Weyenberg and Jay A. Wabeke caused or aided and abetted in causing respondent Holland Furnace Company to violate and disobey, and fail and refuse to comply with, the order of this court. They have not committed criminal contempts of this court and of its lawful authority.

During the period covered by the contempt citation herein, respondents Weyenberg and Wabeke had no real or effective power or authority over or responsibility for the sales operations of the company or the actions of its agents, representatives, and employees in connection with the offering for sale, sale, and distribution of its products and services, and no real or effective power or authority over or responsibility for the selection, employment, promotion, demotion, transfer, removal, or discharge of those agents, representatives and employees.

V.

We find the record shows that directors John D. Ames, Ralph Boalt, George Spatta, and Robert H. Trenkamp were grossly negligent in failing to perform fully their duties as directors of Holland Furnace Company and in relying upon Cheff's assurances that this court's order was not being violated or disobeyed. The gross negligence in this case does not, however, constitute criminal contempt. Trenkamp's position, as attorney for Holland during and after the proceedings before the Commission, imposed upon him a special responsibility, in addition to that which he had as director. It is questionable, to say the least, whether this professional responsibility was discharged by Trenkamp in a manner that reflected fully an awareness of this added responsibility.

There is no justification upon testimony in the hearing and the facts stated in their answers to the petition, which we are taking as true, to infer that these respondents did anything affirmatively or positively to cause or to aid and abet in causing violations of this court's order. We have a reasonable doubt that they knowingly, wilfully and intentionally caused or aided and abetted in causing respondent Holland Furnace Company to violate the order. We find

that the evidence does not prove beyond a reasonable doubt that directors Ames, Boalt, Spatta, and Trenkamp are guilty of the criminal contempt charged against them. The rule to show cause as to them is discharged.

What we have said in the next preceding paragraph about the above-named four directors applies equally to Katherine Nystrom Cheff and Edgar P. Landwehr, who filed no answers. The record is virtually silent as to them, and justifies only the inference that they were grossly negligent in their duties. It does not justify an inference that they knowingly, wilfully and intentionally caused or aided and abetted in causing the violation of this court's order. The rule to show cause as to them is discharged.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 4, Illinois
January 27, 1965

Before
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

In re: HOLLAND FURNACE COMPANY } Petition for Criminal Contempt.

No. 13671

JUDGMENT ORDER

[Entered January 27, 1965]

This cause having come on to be heard in open court on the petition of the Federal Trade Commission, filed March 19, 1962, and the order to show cause as prayed in said petition, which order was issued March 19, 1962, and which order directed Holland Furnace Company to answer said petition and to show cause, if any there be, why it should not be adjudged in criminal contempt of this court, and punished for such criminal contempt, by reason of having knowingly, wilfully and intentionally violated and disobeyed, and failed and refused to comply with an order of this court entered on August 5, 1959, in Cause No. 12451, entitled on the records of this court "Holland Furnace Company, Petitioner, v. Federal Trade Commission, Respondent," all as appears from the said petition of the Federal Trade Commission, and the answer of Holland Furnace Company filed August 15, 1962, and its further answer filed November 27, 1962, a reply to said answer and further answer filed April 18, 1963 by the prosecutors ap-

pointed by this court, together with said prosecutors' motion for a finding that Holland Furnace Company has committed criminal contempt of this court and that the court adjudge punishment accordingly, as well as the answer of Holland filed September 30, 1963; and

This cause also having been heard on the verified petition filed April 19, 1963 by the attorneys appointed to prosecute on behalf of the court, which petition named as additional respondents herein Paul Theodore Cheff, Katherine Nystrom Cheff, Edgar P. Landwehr, John D. Ames, Ralph Boalt, Robert H. Trenkamp, George Spatta, Alvin W. Klomparens, Richard J. Koerner, Henry Weyenberg and Jay A. Wabeke; and the answer of said additional respondents filed herein, including the amendments to answer and a supplemental answer, the prosecution's replies to all of said respondents' answers, and the court having reserved its ruling on the motions of respondents Wabeke and Weyenberg that the order to show cause be discharged as to them; and

The court having heard and considered the evidence offered in open court in support of the petitions and the evidence offered by various respondents, and the cause having been submitted to the court thereon, and the court having considered the motions of the various respondents for a discharge of the rule to show cause and having considered the various briefs and memoranda of law filed by counsel representing all respondents and said prosecutor, and the court having this day filed a written opinion which makes findings of fact in this case;

The court finds that, as to the respondents Wabeke and Weyenberg, it has not been proved by evidence beyond a reasonable doubt that they knowingly, wilfully and intentionally caused, or aided and abetted in causing respondent

Holland Furnace Company to violate, disobey and fail and refuse to comply with said order of this court entered on August 5, 1959.

As to respondent Katherine Nystrom Cheff, the court finds that it has not been proved by evidence beyond a reasonable doubt that she knowingly, wilfully and intentionally caused, or aided and abetted in causing respondent Holland Furnace Company to violate, disobey and fail and refuse to comply with said order of this court entered on August 5, 1959.

As to the respondents Edgar P. Landwehr, John D. Ames, Ralph Boalt, Robert H. Trenkamp and George Spatta, the court finds that it has not been proved by evidence beyond a reasonable doubt that they knowingly, wilfully and intentionally caused, or aided and abetted in causing respondent Holland Furnace Company to violate and disobey, and fail and refuse to comply with said order of this court entered on August 5, 1959.

It Is Therefore Ordered that said rule to show cause is hereby discharged as to said Henry Weyenberg, Jay A. Wabeke, Katherine Nystrom Cheff, Edgar P. Landwehr, John D. Ames, Ralph Boalt, Robert H. Trenkamp and George Spatta.

And having considered the evidence offered in open court and the admissions made in the answer of respondent Holland Furnace Company, the court finds that it has been proved beyond a reasonable doubt that said respondent knowingly, wilfully and intentionally violated, disobeyed, failed and refused to comply with said order of this court entered on August 5, 1959; that, as to respondents Paul Theodore Cheff, Alvin W. Klomparens and Richard J. Koerner, the court finds that it has been proved beyond a reasonable doubt that they and each of them knowingly,

wilfully and intentionally caused, and aided and abetted in causing, the aforesaid violations by Holland Furnace Company of the said order of this court, entered on August 5, 1959; and said Company and Cheff, Klomparens and Koerner have thereby committed criminal contempt of this court and of its lawful authority.

It Is, Therefore, Ordered that said Holland Furnace Company, Paul Theodore Cheff, Alvin W. Klomparens and Richard J. Koerner be and they are hereby each adjudged in criminal contempt of this court, by reason whereof the court imposes a fine on said Holland Furnace Company of One Hundred Thousand Dollars and costs to be taxed by the clerk of this court, payable forthwith, and that execution issue therefor; and also by reason whereof the court sentences Paul Theodore Cheff to imprisonment for a period of six months and he is ordered committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for said period of six months; and also by reason whereof the court sentences the respondents Alvin W. Klomparens and Richard J. Koerner each to pay a fine of Five Hundred Dollars forthwith, and in default of payment of said fine each is to stand committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment until said fine be paid or until otherwise discharged as provided by law, said fines and costs to be payable to the clerk of this court, either in United States currency or a bank's certified check.

It Is Ordered that the clerk deliver a certified copy of this judgment order and commitment to the United States marshall and that the said copy serve as the commitment of those respondents subject to committal as aforesaid.

APPENDIX D

[Order of the Court of Appeals for the Seventh Circuit, Entered August 5, 1959, in a Proceeding Entitled "Holland Furnace Company, Petitioner, v. Federal Trade Commission, Respondent," being Cause No. 12451]

"This case came on for consideration on respondent's motion for an order commanding petitioner Holland Furnace Company to obey and comply with the order to cease and desist entered against it by respondent Federal Trade Commission on July 7, 1958, unless and until said order shall be set aside upon review by this Court or by the Supreme Court of the United States, and upon petitioner's answer to said motion.

"Upon consideration whereof it is the judgment of this Court that issuance of the order prayed for is necessary to prevent injury to the public and to petitioner's competitors pendente lite; wherefor it is

"ORDERED that respondent's aforesaid motion be, and it hereby is, granted, and it is

"ORDERED that petitioner be, and it hereby is, commanded forthwith to obey and comply with the order to cease and desist entered against it on July 7, 1958, in a proceeding before respondent entitled 'In the Matter of HOLLAND FURNACE COMPANY, a corporation, Docket No. 6203,' until and unless said order to cease and desist shall be set aside upon review by this Court or by the Supreme Court of the United States, or until further order of this Court.

/s/ ELMER J. SCHNACKENBERG,
Judge

/s/ JOHN S. HASTINGS
Judge

/s/ FRED L. WHAM
Judge"

[Cease and Desist Order of the Federal Trade Commission, Entered on July 7, 1958, in a Proceeding Entitled "In the Matter of Holland Furnace Company, a corporation," being Docket No. 6203][9]

"ORDER

"IT IS ORDERED, That respondent Holland Furnace Company, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as 'commerce' is defined in the Federal Trade Commission Act, of furnaces, heating equipment, or parts therefor, do forthwith cease and desist from:

"(1) Representing, directly or indirectly that any of its employees are inspectors or are employees or representatives of Government agencies or of gas or utility companies.

"(2) Representing, contrary to fact, that its salesmen or servicemen are heating engineers.

"(3) Representing that any furnace manufactured by a competitor is defective or not repairable, or that the continued use of such furnace will result in asphyxiation, carbon monoxide poisoning, fires, or other damage, or that the manufacturer of such furnace is out of business, or that parts of such furnace are unobtainable, unless such are the facts.

"(4) Tearing down or dismantling any furnace without the permission of the owner.

"(5) Representing that a furnace which has been dismantled cannot be reassembled and used without danger

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[9] This order, contained in the hearing examiner's initial decision, *Holland Furnace Co.*, 55 F.T.C. 55, 90-91 (1958), was adopted without change by the Commission in its opinion denying Holland's appeal, as follows, 55 F.T.C. 91, 95:

"the findings, conclusions and order contained in the initial decision are adopted as the decision of the Commission."

of asphyxiation, gas poisoning, fires, or other damage, or for any other reason, when such is not a fact.

"(6) Requiring the owner of any furnace which has been dismantled by respondent's employees to sign a release absolving the respondent of liability for its employees' negligence, or of any other liability, before reassembling said furnace.

"(7) Refusing to immediately reassemble, at the request of the owner, any furnace which has been dismantled by respondent's employees.

"(8) Misrepresenting in any manner the condition of any furnace which has been dismantled by respondent's employees."

INDEX

CITATIONS

773-167—65

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 972

HOLLAND FURNACE COMPANY, PETITIONER

v.

ELMER J. SCHNACKENBERG, ROGER S. KILEY AND LUTHER M. SWYGERT, CIRCUIT JUDGES

No. 1043

PAUL T. CHEFF, PETITIONER

v.

ELMER J. SCHNACKENBERG, ROGER S. KILEY AND LUTHER M. SWYGERT, CIRCUIT JUDGES

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DECISION BELOW

The decision of the court of appeals (HF Pet. 2a–11a; C Pet. 18–28) [1] is reported at 341 F. 2d 548.

[1] "HF Pet." refers to the petition for certiorari in No. 972; "C Pet." refers to the petition in No. 1043.

JURISDICTION

The judgment of the court of appeals (341 F. 2d 554; HF Pet. 12a–15a; C Pet. 29–32) was entered on January 27, 1965. Motions for rehearing, vacation of judgment, acquittal, or new trial were denied on February 11, 1965. The petition in No. 972 was filed on March 10, 1965. On February 15, 1965, Mr. Justice Clark extended the time of petitioner in No. 1043 for filing a petition for a writ of certiorari to and including April 12, 1965, and the petition was filed on April 8, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals abused its discretion in imposing a fine of $100,000 upon petitioner in No. 972 for its willful violation of a court order.

2. Whether the court of appeals was required to obtain a pre-sentence report before fixing the punishment of a corporation in a criminal contempt proceeding charging violations of the court of appeals' order.

3. Whether the evidence supports the conviction of petitioner in No. 1043.

4. Whether the sentence of six months' imprisonment imposed upon petitioner in No. 1043 was constitutionally permissible in the absence of a trial by jury.

STATUTE INVOLVED

Section 1(3) of the U.S. Criminal Code, 18 U.S.C. 1(3), reads:

> Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six

months or a fine of not more than $500, or both, is a petty offense.

STATEMENT

Holland Furnace Company, petitioner in No. 972, was convicted by the court of appeals of criminal contempt of that court for willfully violating an order of the court of appeals which had enforced a Federal Trade Commission order to cease and desist from specified fraudulent and oppressive practices in the sale of furnaces and parts to consumers. Paul T. Cheff, petitioner in No. 1043, who had been president and board chairman of the corporation, was also convicted of willfully causing and aiding and abetting in causing the corporation's violations. The court sentenced the corporation to pay a fine of $100,000, and sentenced petitioner Cheff to six months' imprisonment.[2]

The order which was violated was issued by the Court of Appeals for the Seventh Circuit on August 5, 1959, at an early stage of the protracted proceedings for review of the Federal Trade Commission decision. The court then found that immediate enforcement of the Commission's order was necessary to prevent injury to the public and to petitioner's competitors *pendente lite,* and it directed the corporation and its officers to comply with the Commission's order pending judicial review of that order. The court subsequently affirmed the Commission's decision and order (295 F. 2d 302) and, on November 7, 1961, issued a

[2] Two other officers, also convicted, were each fined $500. They have not petitioned for certiorari.

decree making permanent its earlier enforcement order. The Commission's order, as enforced by the court of appeals, directed the company, its officers and employees to cease and desist from making representations that its employees were inspectors and its salesmen heating engineers; from tearing down and dismantling furnaces without permission; and from misrepresenting the condition of dismantled furnaces and the feasibility of their repair.

In March 1962, the Commission filed in the court of appeals a petition for the institution of criminal contempt proceedings against the corporation, supported by 168 affidavits relating to alleged violations. The court issued show cause orders to both petitioners and to other officials of the corporation. The corporation admitted some violations and requested a judgment on the pleadings. Petitioner Cheff filed an answer denying guilt. He also filed a demand for a jury trial, which was denied by the court.

Pursuant to stipulation, the affidavits attached to the contempt petition and certain other documents were considered by the court in lieu of the testimony of live witnesses with regard to the corporation's alleged violations of the order; the hearing dealt primarily with the complicity of petitioner Cheff and other company officials. On January 27, 1965, in the presence of counsel for petitioners and all but one of the other defendants, the court heard counsel for the corporation (who had been excused from attending the hearing), announced and issued its findings and conclusions of law, and entered its order fixing the punishments of those convicted. The court said that it was convinced beyond a reason-

able doubt, on the basis of the entire record, that the company, through a "regular and usual" sales practice, had knowingly, willfully and intentionally violated the order of August 1959. It was also convinced beyond a reasonable doubt that respondent Cheff knowingly, willfully and intentionally caused and aided and abetted in causing violations by the company; that he was the dominant head of the company until May 1962, and was well aware of the condemned sales practices and of the prohibitions in the order; that he made no bona fide attempt to comply or achieve compliance with the order but, on the contrary, pursued a course of conduct designed to construct an apparent compliance and insulate himself from guilt as a facade behind which to continue the condemned sales practices.

ARGUMENT

1. The corporation, petitioner in No. 972, contends that the fine imposed upon it constituted an abuse of discretion in light of the standards prescribed by this Court in *United States* v. *United Mine Workers,* 330 U.S. 258, and *Green* v. *United States,* 356 U.S. 165, 187–189. The record in this case, however, supported the court's conclusion that the 25 specific violations admitted by the corporation were merely representative of "a regular and usual method" (HF Pet. 6a; C Pet. 22) of operations in which petitioner engaged during an extended period of time "throughout the entire territory in which" petitioner conducted its operations (*ibid.*). This flagrant and sustained course of conduct, which admittedly was in violation of the court's order, warranted the imposition of a substan-

tial fine. As this Court observed in *United States* v. *United Mine Workers*, 330 U.S. 258, 303:

> * * * In imposing a fine for criminal contempt, the trial judge may properly take into consideration the extent of the willful and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest, and the importance of deterring such acts in the future. * * *

Moreover, the $100,000 fine was not excessive in light of the serious harm to the consuming public which the corporation caused by its violations of the court order. The total charges to the customers involved in the admitted violations, for example, came to more than $12,200.[3] In addition, between 1956 and 1961 a woman more than 70 years of age was sold seven furnaces for one house at a total cost exceeding $18,500.[4] Other documents in evidence tended to establish additional violations (not admitted, however, by petitioner) in which the charges totalled more than $26,500.[5] The court could consider these injuries to

[3] See the affidavits attached to the petition for institution of the contempt proceeding. Item 1, Envelope 1, Record in No. 1043.

[4] See Attachment 5 to the reply to the corporation's answer, which is in evidence by stipulation. The reply is Item 20, Envelope 3, Record in No. 1043.

[5] See Attachments 8, 11, 12, 24, 36, 51, 55, 56, 65, 71, 76, 78, 80, 85, 92, 112, 121, 128, 130, 150, 153, 156, to the petition for institution of the contempt proceeding. Item 1, Envelope 1, Record in No. 1043.

the public, as well as the evidence in the record regarding petitioner's total sales,[6] in determining the appropriate fine to be imposed on petitioner.

Nor is there any merit to the claim that the fine must be abated because of the change in the corporation's management and operations (HF Pet. 8–9). The facts were presented to the court of appeals before sentencing and in petitioner's motion to modify the sentence, and they were, upon due consideration, rejected as a ground for reduction of sentence. The new management took on the corporation with its then-existing liabilities, which included the possible imposition of a fine for its unlawful conduct; the corporation should not be absolved of its criminal liability merely because it may prove expensive to its stockholders or creditors. In light of the substantial benefits derived by the corporation from its long use of the illegal practices—which presumably inured to the benefit of stockholders and creditors—it was not "harshly punitive" for the court of appeals to impose on the corporation a fine of $100,000.[7]

2. There is no substance whatever to petitioner's claim that the court was required to obtain a pre-sentence report before imposing a fine on the corporation.

[6] The corporation's total sales exceeded $29,000,000 in 1960 and $24,000,000 in 1961. 1961 Annual Report, p. 3, Envelope 13, Record in No. 1043.

[7] Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. 45(*l*), authorizes the imposition of a $5,000 civil penalty for each violation of a Federal Trade Commission order. In a civil suit, therefore, petitioner could have been penalized $125,000 for its 25 admitted violations.

Assuming *arguendo* that Rule 32(c) of the Federal Rules of Criminal Procedure applies to criminal contempt proceedings conducted in conformity with Rule 42, Rule 32(c) leaves it to the discretion of the court whether or not to request such a report. Moreover, the notion of a probation report with respect to a corporation is a singular one. Petitioner did not request such a report nor does it now suggest what such a report might contain or how it could be helpful to the court in determining the sanction to be imposed. Nor was petitioner deprived of any right of allocution or right to be heard prior to sentencing. Petitioner's counsel was heard before sentencing, and he then presented the facts regarding the changes in management—which were again presented to the court in the motion to reduce sentence.

3. The evidence was sufficient to sustain the conviction of petitioner Cheff. The court's finding that "he pursued a course of conduct designed to construct an apparent compliance with the order and to devise a defense against charges of violation" (HF Pet. 7a; C Pet. 23) is supported, *inter alia*, by petitioner's own testimony on cross-examination, wherein he admitted having taken no other steps in 1959 to obtain compliance than he had taken in 1952, in an earlier purported attempt—which he knew to have been ineffective—to stop the corporation's unlawful practices.[8] The record also supports the court's conclusion that petitioner "complained of recommendations to discharge sales-

[8] Compare Transcript 2065–2067 with Transcript 2080, Record in No. 1043.

men" who had violated the court's order and that with his "knowledge and approval * * * salesmen whom [the head of the complaint division] recommended discharging were praised in the [corporation's house organ]" (HF Pet. 7a; C Pet. 24). Petitioner was the author of an article making such a complaint, published on page 1 of the issue dated November 2, 1959 (Prosecution Exhibit 35).[9] That was the first issue after the head of the complaint division had recommended to petitioner that a salesman who had violated the court order be discharged.[10] The article complained about such discharge recommendations, and, in effect, repeated the same objection petitioner had made several days before in a letter to the corporation's counsel (Prosecution Exhibit 87). A special issue of the house organ published in March 1960 commended that salesman and others involved in similar incidents (Prosecution Exhibit 43).

Petitioner's related claim that the order did not put him on notice that failure to correct the practices engaged in by the corporation's salesmen might constitute a violation (C Pet. 6–11) lacks substance. The order directed the corporation and its agents to cease engaging in certain specified misrepresentations and deceptive or unlawful conduct "directly or through any corporate or other device." This adequately informed petitioner—the managing officer of the corporation—that if he did not take appropriate steps to modify his salesmen's practices, he could be held in contempt.

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[9] Transcript 789–790, 894–896, Record in No. 1043.

[10] Transcript 247–255, 783–787, Record in No. 1043.

The court of appeals listed a number of factors which "contributed to a condition which lent itself to undisciplined sales practices," included among which were certain details of the corporation's sales policies, organization, structure, and operations, and petitioner Cheff's management methods, behavior, and attitude (C Pet. 25). There is no merit to the contention (C Pet. 8–11) that Cheff had no notice that those factors were contributory to the corporation's use of the prohibited practices; the Commission so found in its decision issued over a year before the court order. 55 F.T.C. 55, 78, 88–89 (1958). The court clearly had the right to consider petitioner's actions in this context even though the policies, standing alone, might have been entirely lawful. Cf. *International Union, Etc.* v. *United States*, 177 F. 2d 29, 35–36 (C.A.D.C.), certiorari denied, 338 U.S. 871; *United States* v. *United Mine Workers*, 330 U.S. at 267. When the actual basis of Cheff's conviction is thus recognized, there plainly is no conflict between the decision below and that of the Ninth Circuit in *In re Floersheim*, 316 F. 2d 423 (1963).

4. The six months' imprisonment imposed on petitioner Cheff after denial of his demand for a jury trial is within the allowable punishment for a "petty offense" as defined in 18 U.S.C. 1(3), p. 2, *supra*. This satisfies the dictum in *United States* v. *Barnett*, 376 U.S. 681, 694–695, n. 12, as to the maximum permissible punishment pursuant to a non-jury trial. The issue involved in *Harris* v. *United States*, No. 526, this Term, is not, therefore, presented by this case.

CONCLUSION

For the foregoing reasons we respectfully submit that the petitions for writs of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

J. B. TRULY,
E. K. ELKINS,
MILES J. BROWN,
Attorneys appointed to prosecute on behalf of the court of appeals.

MAY 1965.

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In the

Supreme Court of the United States

October Term, 1967

No. [redacted] 67

In re PAUL THEODORE CHERT, Petitioner

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

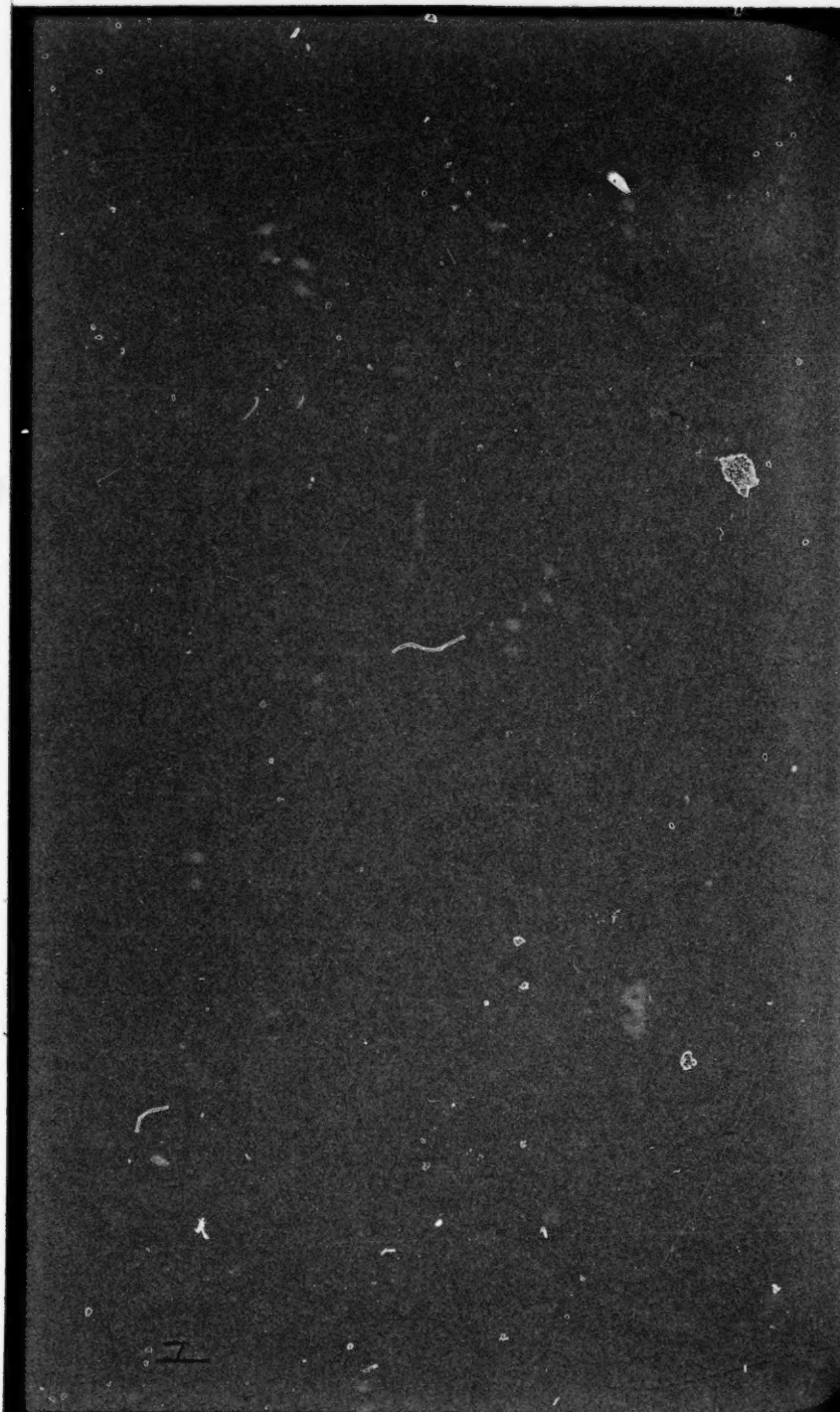
Richard M. Kuhn
Thomas W. [illegible]
James V. [illegible]
135 South LaSalle Street
Chicago, Illinois [illegible]

Counsel for Petitioner

Of Counsel:

Crawford, Kuhn, Kamm,
Rogers & McLaren
135 South LaSalle Street
Chicago, Illinois [illegible]

May 1968



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CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1043

In re PAUL THEODORE CHEFF, PETITIONER

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Question 1[1]—Respondents have failed to come to grips with our basic proposition that petitioner's conviction for criminal contempt is in violation of the right of fair warning guaranteed by the Due Process Clause of the Fifth Amendment. They have sought to obscure this important constitutional issue by not even listing it as a question presented for review by this Court, and by treating it as a mere "related claim" to our attack on the sufficiency of the evidence (Br. 2, 9).

The first of two paragraphs obliquely referring to Question 1 (Br. 9-10) begins with a complete misstatement of petitioner's contention. We are said to have claimed the court order did not put petitioner on notice that "failure to

[1] The various matters raised in respondents' brief in opposition (hereinafter referred to as "Br.") will be discussed under the heading of the question presented in the petition for certiorari in No. 1043 (hereinafter referred to as "Pet.") to which they relate. The abbreviations used herein in citing to the record are the same as those used in the petition (Pet. 2 n.l).

correct the practices engaged in by the corporation's salesmen might constitute a violation" (Br. 9). Petitioner has never contended any such thing. Indeed, we have specifically disclaimed any theory "that a prohibitory order places no affirmative duties on corporate officers or that a criminal contempt conviction may not be based upon a failure of such officers to take action designed to prevent violations by subordinates" (Pet. 9).

What petitioner does contend and what respondents have wholly failed to refute is that his conviction was predicated upon a failure to change certain *sales policies* as distinguished from the eight deceptive *sales practices* inhibited by the court order. These *sales policies* relied upon by the court were neither expressly nor impliedly covered by the order and, hence, petitioner's conviction is in violation of the fundamental principle that no man should be held criminally responsible for conduct which he could not understand to be proscribed or required (Pet. 10).

Respondents next state that petitioner had notice that the "factors" (sales policies) relied upon by the court below "'contributed to a condition which lent itself to undisciplined sales practices'" since they were mentioned in the opinion of the FTC hearing examiner issued over a year before the pendente lite order was entered (Br. 10). But the statements in the hearing examiner's initial decision cited by respondents did not become a part of the FTC cease and desist order nor were they incorporated in the court's pendente lite enforcement order. Indeed, at the time the pendente lite order was entered, the Court of Appeals made no findings as to the correctness of either the FTC decision or any opinions or comments expressed in the hearing examiner's initial report. On the contrary, the sole basis for the pendente lite order was the judgment of the court that issuance of such order was "necessary to prevent

injury to the public and to petitioner's competitors. . . ." (Pet. 33). Thus, at the time the court order was entered there had been no judicial determination that the "factors" now relied upon by the court below were contributory to the use of the prohibited practices.

Furthermore, there is not one scintilla of evidence in this record to show that petitioner's failure to make changes in the sales policies relied upon by the court caused a single violation of the order. This essential causative link is supported by nothing but pure assertion.

It is obvious, therefore, that the cited comments in the FTC examiner's initial decision afforded petitioner no notice that his failure to change policies respecting markets, pricing, the basis for compensating salesmen and the structure of Holland's sales organization would subject him to liability for criminal contempt. In any event, as we have previously pointed out, had the FTC or the court considered changes in Holland's policies on these matters essential to effect compliance, provisions requiring such action could have been incorporated in the orders (Pet. 8-9).

We submit that by holding petitioner in criminal contempt for failing to make policy changes neither expressly nor impliedly required by the terms of the order, the court below engaged in an unforeseeable, retroactive, and hence unconstitutional judicial expansion of the narrow terms of the court order under the teaching of *Bouie* v. *City of Columbia*, 378 U.S. 347, 352 (1964) and *Pierce* v. *United States*, 314 U.S. 306, 310-11 (1941), and reached a result squarely in conflict with the Ninth Circuit's decision in *In re Floersheim*, 316 F.2d 423 (9th Cir. 1963).

Question 2—Although the court below declined to make special findings of fact as petitioner had requested (Pet. 6 n. 5), and although no record references are cited in its

opinion, respondents' brief in opposition now claims there is support in the record for at least two of the court's many conclusions. However, the documents and testimony referred to are an inadequate basis for the conclusions singled out and, indeed, provide a further specific illustration corroborating petitioner's position that the evidence in this record is manifestly insufficient to sustain his contempt conviction.

As support for the court's conclusion that petitioner "pursued a course of conduct designed to construct an apparent compliance with the order and to devise a defense against charges of violation" (Pet. 23) respondents refer to an alleged admission made by petitioner on cross-examination (Br. 8). It is claimed that petitioner "admitted having taken no other steps in 1959 to obtain compliance than he had taken in 1952, in an earlier purported attempt—which he knew to have been ineffective—to stop the corporation's unlawful practices" (*Ibid.*). Even a cursory glance at the cited pages of transcript show this contention to be totally inaccurate. Petitioner admitted no such thing.

What happened was this: during the course of cross-examining petitioner, prosecution counsel asked the court to take judicial notice of testimony given by petitioner in the antecedent FTC proceeding. Over petitioner's objection, this prior testimony was admitted, not for purposes of impeachment but as "primary evidence," and was then read into the record.[2] It disclosed that in 1952, petitioner wrote to Mr. Richard P. Whiteley, Director of the Bureau of Anti-Deceptive Practices of the Federal

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[2] All matters pertaining to the admission into evidence of petitioner's testimony in the FTC proceeding, including our objections thereto and the arguments of prosecution counsel based upon such testimony, will be found in Env. 11, Tr. Vol. 18, pp. 2068-87.

Trade Commission, and agreed to take steps to prevent the use of certain sales practices by Holland's salesmen. In the FTC proceeding, petitioner was asked what steps had been taken and he stated:

> "A We have a public relations department which employs several men. We have extra men out under the branch controller. We have established a man under—an ex-FBI man, who was hired from the FBI. We have had repeated meetings with division managers and we have issued bulletins or letters on it.
>
> "Q Have you bulletinized your individual salesmen on this?
>
> "A I think not" (Env. 11, Tr. Vol. 18, p. 2080).

Prosecution counsel in this case then argued to the court (petitioner did not admit) that the steps taken in 1959 to obtain compliance were no different than those taken in 1952 (*Id.*, pp. 2085-87).

Until receiving the respondents' brief, we had no way of knowing that petitioner's testimony in the FTC proceeding was being relied upon as a basis for his contempt conviction and, hence, we made no reference to such testimony in our petition for certiorari. However, since this prior testimony is now cited as the principal basis for one of the court's conclusions, we again wish to challenge its admission by judicial notice as we did during the trial (Env. 11, Tr. Vol. 18, pp. 2069-70, 2072, 2083, 2086). Judicial notice was improperly taken of this prior testimony since the rules of evidence in an FTC hearing are entirely different than they are in a criminal contempt proceeding and since petitioner was not even a party to the FTC case. In addition, said testimony was admitted into evidence, not during the prosecution's case in chief nor on rebuttal, but while petitioner was presenting his defense.

But even if judicial notice were properly taken, the above-quoted testimony from the FTC hearings (*supra*, p. 5) (the only evidence in the record concerning what was done in 1952) wholly fails to show that the steps taken in that year were in any way comparable to the compliance program set up following entry of the pendente lite order in 1959. The department referred to in petitioner's prior testimony was denominated "a public relations department." There is no showing that this department was charged with the functions assigned to the Product Service Department, which was specially set up in 1959 to assure compliance with the pendente lite order and which was given the direction and authority to investigate, document and take appropriate disciplinary action in response to sales complaints (see Pet. 7 and record citations). The prior testimony refers to "meetings with division managers" but does not disclose what matters were discussed at such meetings, the frequency of them or the period of time during which such meetings were held. In contrast, the uncontradicted testimony in this record shows that following the entry of the pendente lite order, compliance procedures were discussed at all division managers' meetings, which were held monthly (see Pet. 7-8 and record citations). In the FTC proceeding, petitioner testified that bulletins were sent out but the testimony does not reveal the content of such bulletins, the frequency with which they were sent out or their purpose. The FTC testimony further indicates individual salesmen were not bulletinized. In contrast, following entry of the court order, a number of bulletins were sent periodically to individual salesmen specificially emphasizing compliance with the court order (see Pet. 7 and record citations).

Assuming, *arguendo*, that the steps taken in 1952 and 1959 were comparable, the record still does not support the

conclusion that the 1952 program was inherently deficient and that petitioner knew this. The only evidence in the record is to the contrary and shows that Mr. Whiteley, himself, wrote to Holland in January 1953, complimenting it for

> ". . . making every effort to satisfy the complaints that had been made with respect to certain practices of your employees" (Env. 14, CX 52).

Perhaps of greatest significance is the fact that the court below made no finding nor did respondents refer to any evidence (indeed there is none) that petitioner knew or had any reason to believe that the compliance program set up in 1959 was not bringing about compliance with the court order. On the contrary, the record shows that countless men who violated the court order were either fired or demoted (see Pet. 8 and record citations). It further shows that petitioner was given frequent reports and in fact believed that the steps taken by the company following entry of the court order were effectively bringing it into compliance and preventing violations (Env. 10, Tr. Vol. 16, pp. 1832-38, 1855-57; Env. 13, PX 93; Env. 14, CX 3, 35, 37, 40, 41).

Respondents claim support for the court's conclusion that petitioner complained of recommendations to discharge salesmen suspected of violating the court order, based on a November 2, 1959 "Firepot" article (Env. 13, PX 35) and a letter which petitioner wrote several days earlier (*Id.*, PX 87; Br. 8-9).

That article, however, simply does not support the conclusion. It does not even mention "salesmen" nor is it directed at attempts to fire employees who engage in deceptive sales practices. In fact the article excepts from its scope recommendations to fire employees who engage

in deceptive practices and thereby "jeopardize the welfare of the company" and warns that employees guilty of such practices will be dealt with by "summary action" (Env. 13, PX 35). What it does condemn is the unjustified and indiscriminate firing of company employees simply because someone "dislikes the cut of . . . [their] features" or "doesn't like what . . . [they have] said" or about whom there is "a slight rumor" or for "lack of business' (*Ibid.*). Petitioner specifically testified that the article was written because four or five branch managers had been fired for this last reason—lack of business—and that it had nothing to do with recommendations to fire employees who were thought to have violated the court order (Env. 10, Tr. Vol. 16, pp. 1902-03).

Furthermore, petitioner's letter to company counsel does not support the court's conclusion since it, too, was directed only at unjustified recommendations to " 'fire' everybody" (Env. 13, PX 87). Petitioner carefully pointed out that he was not talking about employees guilty of deliberate wrongdoing or prevarication whom, he stated, "we do not want" (*Ibid.*).

Thus, neither PX 35 nor PX 87 provides a basis for the conclusion that petitioner complained of recommendations to discharge salesmen who had violated the pendente lite order.

A March 1960 issue of the "Firepot" (Env. 13, PX 43) is cited as evidence that " 'salesmen whom [the head of the complaint division] recommended discharging were praised in the [corporation's house organ]' " with petitioner's " 'knowledge and approval' " (Br. 9). The "salesman" mentioned in respondents' brief as having been the subject of a discharge recommendation, one Joseph Mascali, was in fact demoted to a position in which he made substantially less money (Env. 8, Tr. Vol. 2, pp. 256-59). The prosecu-

tion did not prove or even contend that Mascali, after his demotion, did anything even suggestive of being a deceptive sales practice.

The "praise" accorded Mascali consisted of merely listing his name, along with 27 others, on page 12 of this issue of the "Firepot" (PX 43) under the heading "Special Heating Technician Citations."

Most importantly, there is not one scrap of evidence in this record (and respondents could point to none) showing that petitioner either knew of or approved giving such "praise" to this salesman.

Thus, none of the evidence cited in the respondents' brief supports the court's conclusions and this absence of any substantial evidentiary basis further illustrates the need for review on certiorari by this Court.

Question 3—Respondents argue that since the prison sentence imposed upon petitioner is within the punishment limits established by Congress in 18 U.S.C. § 1(3) (Br. 2-3), the issue involved in *Harris* v. *United States, cert. granted,* 379 U.S. 944 (1964) (No. 526) is not present in this case. However, the fact that petitioner's six-month prison sentence does not exceed the maximum period designated by Congress in order for a statutory misdemeanor to be a "petty offense" is not determinative. There is nothing in *United States* v. *Barnett,* 376 U.S. 681 (1964) suggesting that the petty offense punishment limits contained in 18 U.S.C. § 1(3) are applicable to a contempt proceeding. Indeed, the penalty that may be imposed in a non-jury trial criminal contempt case raises an important constitutional question under Article III, § 2, Par. 3, and the Sixth Amendment (Pet. 17) which this Court, not Congress, must decide. Hence, the issue involved in *Harris* is also pre-

sented in this case and, accordingly, certiorari should be granted.

For all of the reasons set forth in the petition and this reply we urge that a writ of certiorari be issued.

Respectfully submitted,

RICHARD M. KECK
THOMAS W. JOHNSTON
JOSEPH V. GRIFFIN
135 South LaSalle Street
Chicago, Illinois 60603

Counsel for Petitioner

Of Counsel:

CHADWELL, KECK, KAYSER,
RUGGLES & MCLAREN
135 South LaSalle Street
Chicago, Illinois 60603

May 1965

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CITATIONS

CONSTITUTION, STATUTES AND RULES:

TREATISES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 67

PAUL THEODORE CHEFF, *Petitioner,*

v.

ELMER J. SCHNACKENBERG, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Court of Appeals (R. 15-24) is reported at 341 F. 2d 548.

JURISDICTION

The judgment of the Court of Appeals was entered January 27, 1965 (R. 25-28). The petition for a writ of certiorari was filed on April 8, 1965, and certiorari was granted on November 15, 1965. The jurisdiction of this Court rests upon 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Whether, after denial of a demand for jury trial, the sentence of imprisonment of six months imposed upon petitioner is constitutionally permissible under Article III and the Sixth Amendment.

CONSTITUTIONAL PROVISIONS

The provisions of the United States Constitution involved are Article III and the Sixth Amendment. Article III, Sec. 2, par. 3, provided in pertinent part:

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed . . . ."

The Sixth Amendment provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."

STATEMENT

In this case, Petitioner was found guilty of criminal contempt and sentenced to imprisonment for a period of six months by the Court of Appeals for the Secenth Circuit for willfully causing violations of a pendente lite order of that Court enforcing a cease and desist order of the Federal Trade Commission. (R. 25)

On July 7, 1958, in an administrative proceeding entitled "In the Matter of Holland Furnace Company, a corporation, Docket No. 6203," the FTC entered an order commanding said corporation "and its officers, agents, representatives, and employees," in connection with the sale of furnaces and heating equipment

in commerce, to cease and desist from eight specified practices found to constitute unfair methods of competition under the Federal Trade Commission Act. (R. 1)

Thereafter, in the course of a proceeding initiated by the Holland Furnace Company (hereinafter sometimes called Holland) to review the FTC cease and desist order, the Court of Apepals for the Seventh Circuit, on application of the FTC, entered a pendente lite order on August 5, 1959, commanding the Holland Furnace Company to comply with the cease and desist order "until and unless said order . . . be set aside . . . or until further order of . . .(the) Court" (R. 3&4). Petitioner was not a party to the FTC proceedings or to the review proceedings in the Court of Appeals, nor was he named in the Court's pendente lite enforcement order. Both the FTC cease and desist order and the Court's order enforcing the same were limited to prohibiting eight deceptive sales practices, and neither contained any provision specifying what steps or affirmative actions were required to be taken by the company of its executives to prevent violations. (R. 3&4)

On Petition of the FTC, the Court of Appeals, on April 26, 1963, issued a rule to show cause against Petitioner (who, during the relevant period, had been a director, president and chief executive officer of Holland) and against six other directors and four other Holland executives; each of these persons was required to show cause why he should not be held in criminal contempt

> "by reason of having knowingly, wilfully and intentionally caused, and aided and abetted in causing, respondent Holland Furnace Company to vio-

late and disobey, and fail and refuse to comply with . . . (the pendente lite order of the Court) entered on August 5, 1959 . . . ." (R. 4&5)

Also on April 26, 1963, an order was entered appointing counsel for the FTC as attorneys to prosecute the proceeding on behalf of the Court (R. 6&7).

Petitioner filed a verified answer to the rule to show cause denying that he had knowingly, wilfully or intentionally caused and aided and abetted in causing Holland Furnace Company to violate and fail and refuse to comply with the Court's order of August 5, 1959 (R. 10).

On October 9, 1963, the Court of Appeals ordered the Petitioner to file on or before November 8, 1963, an election of trial by jury or a waiver of a jury trial (R. 11).

In accordance with the order of the Court, the Petitioner elected a trial by Jury (R. 11&12).

On May 27, 1964, the Court of Appeals denied the election of a trial by jury made in accordance with its order of October 9, 1963 (R. 14).

The proceeding was tried by the Court of Appeals, which heard evidence. On January 27, 1965, the Court rendered an opinion (R. 15) and entered a judgment order (R. 25): finding that Petitioner "knowingly, wilfully and intentionally caused, and aided and abetted in causing, in one or more instances, violations by Holland Furnace Company of each of the eight prohibitions in the August 5, 1959, order of this court."

In this order of the Court, the eight prohibitions were:

(1) Representing, directly or indirectly that any of its employees are inspectors or are employees or representatives of government agencies or of gas or utility companies.

(2) Representing, contrary to fact, that its salesmen or servicemen are heating engineers.

(3) Representing that any furnace manufactured by a competitor is defective or not repairable, or that the continued use of such furnace will result in asphyxiation, carbon monoxide poisoning, fires, or other damage, or that the manufacturer of such furnace is out of business, or that parts of such furnace are unobtainable, unless such are the facts.

(4) Tearing down or dismantling any furnace without the permission of the owner.

(5) Representing that a furnace which has been dismantled cannot be reassembled and used without danger of asphyxiation, gas poisoning, fires, or other damage, or for any other reason, when such is not a fact.

(6) Requiring the owner of any furnace which has been dismantled by respondent's employees to sign a release absolving the respondent of liability for its employees' negligence, or of any other liability, before reassembling said furnace.

(7) Refusing to immediately reassemble, at the request of the owner, any furnace which has been dismantled by respondent's employees.

(8) Misrepresenting in any manner the condition of any furnace which has been dismantled by respondent's employees.

SUMMARY

1. Criminal contempt is included in the provisions of Article III and Amendment 6 of the United States Constitution.

2. The sentence of six months' imprisonment is not constitutionally permissible because contempt powers in administrative law cases are civil, not criminal.

3. Petitioner was entitled to a jury trial under the provisions of Article III, Sec. 2 of the Constitution and the Sixth Amendment before he could be sentenced to a term of six months' imprisonment. The severity of the sentence, imprisonment for six months, imports a crime which is not punishable except in accordance with the dictates of the Constitution.

ARGUMENT

The Intent of the Framers of the United States Constitution Was Not to Exempt Criminal Contempt from the Provisions of Article III and Amendment 6

Seven hundred fifty years ago, the barons of the English realm wrested from the despotic King John certain fundamental rights which no sovereign could override. These rights were set forth in the great compact known as Magna Carta. The most important part of that document is the famous 39th Clause of the Magna Carta: "No free man shall be taken, imprisoned, disseised, outlawed, banished or in any way destroyed, nor will we proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land."

In addition to Clause 39, the Magna Carta contains Clause 40 that provides for a speedy trial: "To no one will we sell, deny, or delay right or justice."

Here is the kernel of the American judicial ideal of equal justice under law for every man. Whatever the barons and bishops who forced King John to sign the Charter may have intended, Magna Carta now stands for many of the cherished rights of free men. Foremost among these rights is trial by jury.

One hundred ninety years ago, the delegates to the United States Constitutional Convention met with nothing else in view but to provide for posterity against the wanton exercise of power which could not otherwise be done than by the formation of a fundamental constitution. In order to further that purpose, they wrote into the Constitution of the United States two clauses guaranteeing the right to trial by jury. Article III provided that the trial of all crimes except in cases of impeachment shall be by jury, similar to the 39th Clause of the Magna Carta. The Sixth Amendment provided that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury, similar to the 40th Clause of the Magna Carta.

The framers of the Constitution were well aware that in colonial days the courts had exercised the power to try criminal contempts with a vengeance, but without a jury. They sentenced people to be whipped, humiliated in stocks and even nailed by the ear to a pillory. The framers of the Constitution resented the inhumane treatment parcelled out by these courts.

These courts were operating under a colonial governor who owed his power to His Majesty King George III. Their writs and orders were issued under

the authority of King George III, and indeed these papers included the particular year of the King.*

In Massachusetts, so great was the resentment of the colonists against these courts that the House of Representatives voted to impeach the judges. This came about because His Majesty King George III commanded that the judges should receive salaries from the King. The vote of impeachment was, of course, rejected by the Governor, but it remained on the journals of the House and was printed in the newspapers and went abroad into the world. The result was that Grand and Petit Jurors refused to take their oath because, in their minds, the courts stood impeached by the representatives of the people for high crimes and misdemeanors. *Works of John Adams,* Vol. 10, pp. 236-240. Letter to William Tudor.

In Massachusetts, as probably in the rest of the colonies, the judges were Royalists loyal to the mother country. At the outbreak of the Revolution, they fled the colonies or retired into seclusion

The framers of the Constitution, on the other hand, were men who had risked their lives and property and their sacred honor to provide for themselves and posterity against the wanton exercise of power. They most certainly did not intend to put the stamp of their approval on the criminal contempt power of these

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* In April, 1776, a resolve was passed to alter the style of writs and other legal processes and substitute for George III in these papers the name of "The People and Government of Massachusetts," and in dating all official papers to omit the particular year of the king and give only the year of our Lord. Proceedings of the Second Provincial Congress, printed edition of 1838, pp. 262, 263, under date of May 27, 1775.

judges, but they did intend to guard against the oppressions of future magistrates by doubly guaranteeing trial by jury.

Because the deliberations of the framers of the United States Constitution were private and behind closed doors, it is difficult to obtain any great number of direct quotes from the delegates. However, we have a few bearing upon the right to trial by jury.

Elbridge Gerry, delegate from Massachusetts to the Constitutional Convention, urged the necessity of juries to guard against corrupt judges. Farrand, Max, *The Records of the Federal Convention of 1787,* New Haven, Yale University Press, 1911, Vol. II, p. 587. If one of the reasons for granting trial by jury in two instances was to guard against corrupt judges, then of course there could be no exemption from either Article III or Amendment 6 in criminal contempts.

Edmund Randolph, in the Virginia Convention, June 6, 1788, Farrand, Max, *The Records of the Federal Convention of 1787,* Vol. III, p. 309, reported, "The trial by jury in criminal cases is secured—in civil cases it is not so expressly secured as I could wish it." The conclusion is inevitable that he meant that in all criminal cases, as we understand the meaning of criminal cases, the right to a trial by jury is secured by the Constitution.

Alexander Hamilton, in his report *To the People of the State of New York,* had this to say about what the Constitutional Convention intended with relation to trial by jury:

> "The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial

> by jury: Or if there is any difference between them, it consists in this; The former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government. For my own part, the more the operation of the institution has fallen under my observation, the more reason I have discovered for holding it in high estimation; and it would be altogether superfluous to examine to what extent it deserves to be esteemed useful or essential in a representative republic, or how much more merit it may be entitled to as a defense against the oppressions of an hereditary monarch, than as a barrier to the tyranny of popular magistrates in a popular government." Hamilton, Alexander, *The Federalist,* Trial By Jury, "To the People of the State of New York," The Belknap Press of Harvard University, pp. 521-522.

There might have been, and indeed there was, disagreement with respect to "freedom of religion, freedom of the press and free speech," but concerning the right to trial by jury the delegates to the Convention were in complete agreement. They were mindful of the misuse of the contempt power by the colonial courts and wished to be protected from any such oppressions in a future popular government.

James Madison, Father of the Constitution, in a discussion about the manner in which the United States Senate should be selected, said:

> "I mean, however, to preserve the state rights with the same care as I would trials by jury." Brant, Irving, *James Madison, Father of the Constitution,* p. 89.

It is quite clear from the above that the right to a trial by jury was considered the ultimate right, fun-

damental and admitting of no discussion. It is a constitutional right that is conclusive and definitive.

It is an historical error to permit the courts to impose fixed sentences of imprisonment. The courts have the inherent power to impose conditional imprisonment for the purpose of compelling a person to obey a valid order. When it is asserted that the courts have a right to go beyond compliance and sentence a man to imprisonment for a fixed term, it would be well to remember that any such right is in conflict with a greater right, the right to a trial by jury as doubly guaranteed by the Constitution. (Article III & Sixth Amendment)

Petitioner will not attempt to repeat the discussion of the dissenting Justices in *United States* v. *Barnett,* 376 U.S. 681, 12 L. Ed. 2d 23, or in *Green* v. *United States,* 356 U.S. 165. They develop soundly the proposition that criminal contempt is a crime which entitles the defendant to a trial by jury.

The Sentence of Six Months Imprisonment Is Not Constitutionally Permissible Because Contempt Powers in Administrative Law Cases Are Civil, Not Criminal

In this case, the Petitioner was sentenced to imprisonment for a period of six months for wilfully causing violations of a pendente lite order of the Court enforcing a cease and desist order of the Federal Trade Commission.

The Federal Trade Commission Act, Ch. 311, 38 Stat. 717, Title 15, Sec. 41, et cet., U.S.C.A., empowered the Federal Trade Commission to issue orders directing violators to cease and desist from using unfair methods of competition. It also provided that if the Commission's order was violated then the Commission

could apply to a circuit Court of Appeals for enforcement of the order.

There are other administrative agencies that have been authorized by act of Congress to petition the Circuit Courts of Appeals for the enforcement of their orders:

National Labor Relations Act, 49 Stat. 449, Title 29, Sec. 151, et cet., U.S.C.A., Ch. 372.

Federal Power Act, Title 16, Sec. 791, U.S.C.A. Amend., Ch. 28541, Stat. 1063.

Federal Seed Act, Title 7, Sec. 1551, U.S.C.A., Ch. 615, 53 Stat. 1275.

Packers and Stockyards Act, Title 7, Sec. 181, U.S.C.A., Ch. 64, 42 Stat. 159.

Natural Gas Act, Title 15, Sec. 717, U.S.C.A., Ch. 556, 52 Stat. 821.

None of these statutes contain a Congressional grant to a United States Court of Appeals to try and punish people for criminal contempt of court. Since the devisions of these federal bureaus affect more and more of the particulars and details of the business life of our country, it would be unjust to the businessmen of our country to deny them the right to trial by jury.

In a National Labor Relations Act procedure, the United States Court of Appeals, Second Circuit, regarded the violations of Courts of Appeals orders as civil contempts. *N.L.R.B.* v. *Mastro Plastics Corp.*, 261 Fed. 2d. 147.

In another case, the Second Circuit Court of Appeals has said that in a violation of a Court of Appeals order enforcing an NLRB order the purpose is wholly remedial, and since its purpose is wholly re-

medial, the proceeding is one for civil contempt rather than criminal contempt. *N.L.R.B.* v. *Hopwood Retinning Company,* 104 F. 2d 302.

The Seventh Circuit Court of Appeals in the case of an FTC order regarded the contempt as criminal. *F.T.C.* v. *A. McLean & Son,* 94 F. 2d 802.

There is a conflict between the Second Circuit Court of Appeals and the Seventh Circuit Court of Appeals on the question of whether the Courts of Appeals' contempt power in administrative law cases is civil or criminal. None of the statutes above cited contain a clear and unequivocal Congressional grant or indeed say anything about enforcing the Courts' orders. In the absence of any Congressional authority, it is submitted that the administrative law cases should be regarded as involving civil contempt.

The instant case vividly illustrates why violation of a decree of a court enforcing an administrative order should be considered civil contempt, not criminal.

Prior to reference to the Court of Appeals, there had been two years of hearings and over five thousand pages of testimony. These hearing were conducted by an FTC Examiner. In these hearings the rules concerning the materiality and relevancy of evidence are virtually suspended. Any evidence is admitted. Proof by a fair preponderance of the evidence or beyond reasonable doubt is foreign to such hearings.

It is understandable that the Court of Appeals, already overburdened by a huge volume of cases, would seek to shorten the proceedings by relying upon the

Federal Trade Commission's testimony and the aid of its representatives.

In this case, the Court of Appeals appointed counsel for the FTC as attorneys to prosecute for criminal contempt (R. 6).

The proof that the Court of Appeals hearings took on not only the color but also the substance of an FTC hearing can be found in the Court's opinion (R. 15). In that Court order it can be seen that the basis for the conviction and the imposition of six months imprisonment rested almost entirely upon FTC type of evidence, such as: Petitioner did not travel to meet with Better Business Bureaus in various parts of the country; he did not go out into the field to meet with branch managers and salesmen to compel compliance; he did not take pains to see that his entire sales organization understood the seriousness of compliance as did his successors in management by bringing two thousand salesmen to Holland, Michigan; his bulletin avoided using the word "discharge" and it was also ineffective to influence radical changes in Holland's sales policy; the sales heirarchy was loose; the relationship between the Petitioner and the sales managers was tenuous; Petitioner remained aloof from the sales managers, division managers and salesmen.

There is no evidence that Petitioner's conduct caused any violation of any of the eight provisions of the cease and desist order. In any event, the recorded evidence falls far short of proving beyond a reasonable doubt that Petitioner is guilty of knowingly, wilfully and intentionally causing and aiding and abetting in causing, in one or more instances, violations of each

of the eight provisions in the cease and desist order. *Michaelson* v. *United States,* 266 U.S. 42, 66 (1924); *Gompers* v. *Buck Stove and Range Company,* 221 U.S. 418, 444 (1911).

There is no reason for relaxing the normal standards of proof required to sustain a conviction under Title 18, Sec. 401(3). *Green* v. *United States,* 356 U.S. 165, 2 L. Ed. 2d 672, 711, dissenting opinion, Mr. Justice Brennan.

Petitioner made request for "special findings" under Rule 23(c) of the Rules of Criminal Procedure. Although this rule says, "In a case tried without a jury, the court shall make a general finding and shall in addition on request find the facts specially," the Court, in lieu of making the "special findings" requested, made its own findings of fact (R. 17).

The Petitioner's conviction on this record is a clear abuse of contempt power and clearly shows the correctness of the Second Circuit Court's decisions regarding administrative law cases as involving civil contempt.

The Imposition of the Sentence of Imprisonment for Six Months After Denial of a Jury Trial Violates Article III and the Sixth Amendment

This is the first time that an officer of a corporation has been sentenced to imprisonment upon petition of the Federal Trade Commission for criminal contempt of a United States Court of Appeals order. The corporate respondent was fined $100,000. Two other officers of the company were fined $500 each, and the Petitioner was sentenced to six months in prison because he was the dominant head of the company from

August 5, 1959, until May, 1962 (R. 20) and failed to make policy changes in the company's business.

The Petitioner had not been an officer of the company since May, 1962. The Judgment of the Court of Appeals was imposed January 27, 1965. For two and one-half years, the Petitioner's successors in management had ceased and desisted in such a manner as to win the compliments of the Circuit Court of Appeals (R. 21). In fact, during this period of time, the company had completely withdrawn from the business of replacement of furnaces, which is the area in which the violation is alleged. The sentence is therefore entirely punitive. The absence of any necessity of assuring future compliance should have been considered in imposing sentence. *United States* v. *United Mine Workers of America,* 330 U.S. 258, 303.

The Court of Appeals should have used the least possible power adequate to enforce its order and protect its dignity. *Bigelow* v. *RKO Radio Pictures,* 78 F. Supp. 250; *In the Matter of Criminal Contempt of Thomas C. McConnell, Petitioner,* 370 U.S. 230, 8 L. Ed. 2d 434.

In *Ballantyne* v. *United States,* 237 F. 2d 657, 667, Circuit Judge Cameron stated:

> "It is abhorrent to Anglo-Saxon justice as applied in this country that a man, however lofty his station or venerated his vestments, should have the power of taking another man's liberty from him. Society has permitted only one exception, a limited right of courts to punish for contempt. But that right has been grudgingly granted, has been held down uniformly to the least possible power adequate to the end proposed."

The Holland Company operated in 44 states with 475 branch offices. It had a field organization of approximately 5,000 employees. *Holland Furnace Company, Petitioner,* v. *Federal Trade Commission, Respondent,* No. 12451, U.S. Court of Appeals, 7th Circuit, 295 F. 2d 302. Modern business practices require that officers of large corporations delegate duties to and rely upon other officers and employees. It is unrealistic to assume that, because a man is president and the dominant head of Holland Furnace Company, he is responsible for any actions of subordinate sales employees that might have violated one or more of the eight prohibitions covered by the order. Petitioner's conviction was not based upon a charge or evidence that he personally engaged in any of the eight deceptive practices. There is no evidence that there has been a single prosecution of any sales employee for the crimes alleged in the cease and desist order.

The sentence of the Court of Appeals is not based upon any affirmative action but rather on the failure by Petitioner to make policy changes. Since none of the sales policies and other matters relied upon by the Court of Appeals were required to be changed or were covered in any way by the FTC order as enforced by the Court's order, the Petitioner's failure to act in accordance with the Court's idea of the way the business should be conducted ought not to subject him to a penalty of six months. It is fundamental that no man should be held criminally responsible for conduct which he could not understand to be proscribed or required. *United States* v. *Harris,* 347 U.S. 612, 617. The Petitioner certainly should not be sentenced to prison for six months for conduct

which was not proscribed or required in the cease and desist order. *In Re Floersheim,* 316 F. 2d 423 (9th Circuit, 1963).

The Floersheim case, *supra,* was a proceeding for criminal contempt of an order of the Court of Appeals enforcing an FTC cease and desist order. It was contended by the FTC that the forms used by the respondent were too "official looking" or "too demanding" or that the paper used was of a color and design sometimes used on checks, or that the address to which cards were to be mailed in Washington, D. C., assumed the government must be involved. The Court rejected such contentions as a basis for a contempt conviction, saying:

> "The short answer to these complaints is that the cease and desist order, as drawn, does not forbid such actions or use." 316 F. 2d 428.

Petitioner's conviction, since predicated upon an unforeseeable and ex post facto expansion of the narrow requirements of the Court order, should not subject him to a sentence of six months imprisonment.

In the instant case, the Petitioner could not reasonably have been expected to construe the Court order as requiring a change in a long-standing practice of paying salesmen on a commission basis or as calling for a reduction in the selling prices of heating equipment (R. 21). The cease and desist order, as drawn, did not forbid such actions, and the Petitioner could not therefore have had a specific intent to cause violations of an order which did not forbid paying salesmen commissions or order a reduction in the selling prices of heating equipment. Assuming that there is some evidence to prove that subordinate sales employees

did violate the order, there is simply no evidence whatsoever that Petitioner acted with the requisite specific intent or that his conduct was the cause of such violations. It is well settled that the intention with which acts of contempt have been committed must necessarily and properly have an important bearing on the degree of guilt and the penalty which should be imposed. *Cammer* v. *United States,* 300 U.S. 399, 100 L. Ed. 474.

Petitioner was not a party to the cease and desist order of the Federal Trade Commission (R. 1). Petitioner was not a party to the Circuit Court of Appeals cease and desist order (R. 3). This lack of intention becomes increasingly apparent when it is understood that Petitioner was not a party to any proceedings up to and including the pendente lite order issued by the Court of Appeals and that there is not the slightest evidence that Petitioner's conduct caused any violation of any of the eight provisions of the cease and desist order. All of this shows a lack of intention to commit an act of contempt, which should have an important bearing on any penalty which should have been imposed.

A sentence of six months' imprisonment after the denial of Petitioner's demand for a trial by jury violates the Sixth Amendment. This was a criminal prosecution that grew out of a cease and desist order of the Federal Trade Commission issued July 7, 1958 (R. 1), and the FTC attorneys were appointed to prosecute for criminal contempt on April 26, 1963. It can readily be seen that the Petitioner did not enjoy the right to a speedy and public trial by an impartial jury. Neither did he enjoy the right to a speedy and

public trial by an impartial jury of the State and district wherein the crime shall have been committed.

In the case of *District of Columbia* v. *Clawans,* 300 U.S. 617, 81 L. Ed. 843, 850, Mr. Justice McReynolds, joined by Mr. Justice Butler in dissenting in part, had this to say:

> "We cannot agree that when a citizen is put on trial for an offense punishable by 90 days in jail or a fine of $300.00, the prosecution is not criminal within the Sixth Amendment. In a suit at common law to recover above $20.00, a jury trial is assured. And to us it seems improbable that while providing for this protection in such a trifling matter the framers of the Constitution intended that it might be denied where imprisonment for a considerable time or liability for fifteen times $20.00 confronts the accused.
>
> "In view of the Opinion just announced, it seems permissible to inquire what will become of the other solemn declarations of the Amendment. Constitutional guaranties ought not to be subordinated to convenience, nor denied upon questionable precedents or uncertain reasoning."

It is fair to comment that Mr. Justice McReynolds and Mr. Justice Butler would view with abhorrence a sentence of six months' imprisonment imposed without a jury trial and growing out of a violation of an FTC order.

On October 9, 1963, the United States Court of Appeals for the Seventh Circuit ordered the Petitioner to file an election of trial by jury or a waiver of a jury trial (R. 11). It is a reasonable inference from this action that the Court on that date at least felt that the Petitioner was entitled to a trial by jury.

On November 8, 1963, the Petitioner elected a trial by jury (R. 12). It was not until May 27, 1964, that the Court determined that the Petitioner was not entitled to a trial by jury and denied the demand for a jury trial made in accordance with its order of October 9, 1963. (R. 11, R. 14). *United States* v. *Barnett,* 376 U.S. 681, was decided in April, 1964. On January 27, 1965, the Court sentenced the Petitioner to imprisonment for a period of six months.

There is nothing in *United States* v. *Barnett,* supra, suggesting that the petty offense punishment limits contained in 18 U.S.C. Sec. 1(3) are applicable to a contempt proceeding, nor does it define petty offense.

The penalty that may be imposed in a non-jury trial criminal contempt case raises an important constitutional question under Article II, Sec. 2, para. 3, and the Sixth Amendment which this Court, not Congress, must decide.

In the *United States* v. *Barnett* case, supra, it was undisputed that there were affirmative actions of contempt, that there was a specific intent to commit contempt, and that there had been no compliance. In the instant case, there had been compliance for a period of two and one-half years before sentence (R. 20). There was no specific intent to commit contempt of the cease and desist order because the things upon which the Court of Appeals bottomed its sentence were not things that were contained in the cease and desist order (R. 1, R. 15). Therefore, the severity of the sentence of six months, without a jury trial that was inferred from the Barnett case, was in violation of Article III and Amendment 6.

It must be borne in mind that this was in the beginning a Federal Trade Commission cease and desist order later adopted by the Court of Appeals for enforcement. These proceedings are almost invariably against corporations where fines are the usual punishment. In this case, the Holland Company was fined $100,000, the largest fine in the history of FTC actions, whether in a civil penalty suit (15 U.S.C., Sec. 45(6)(1)) or a contempt proceeding. See Vol. 5, CCH Trade Reg. Rep. paras. 9701.40 and 9703 and cases cited therein.

In addition, two other officers were fined $500 each, but the Petitioner, who was President of the Corporation, was sentenced to six months' imprisonment. This is the first time in an FTC hearing that an officer of a corporation has been sentenced to a fixed term of imprisonment. Six months' imprisonment for criminal contempt is a far greater sentence than is usually given for criminal violations of the antitrust law (see Tefft, *United States* v. *Barnett,* Supreme Court Review, 1964, at p. 135).

A sentence of six months' imprisonment by a Circuit Court of Appeals is so substantial that it carries with it all of the odium attached to a sentence of two or three years. It destroys a man's reputation and takes away from him his ability to make a living in the business world. It forces him to live the rest of his years in shame and disgrace and dishonors his family. This punishment should not be imposed upon him without the opportunity of having the facts in his case passed upon by a jury of his peers, as is doubly guaranteed by Article III and Amendment 6 of the United States Constitution.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the Seventh Circuit Court of Appeals should be reversed.

Respectfully submitted,

JOSEPH E. CASEY
THOMAS B. SCOTT
1200 - 18th Street, N W.
Washington, D. C. 20036
Counsel for Petitioner

January, 1966.

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 67

PAUL THEODORE CHEFF, PETITIONER

v.

ELMER J. SCHNACKENBERG, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals finding petitioner in contempt (R. 15–24) is reported at 341 F. 2d 548. Its earlier opinion enforcing a Federal Trade Commission cease-and-desist order is reported at 295 F. 2d 302. The opinion of the Federal Trade Commission is reported at 55 F.T.C. 55.

JURISDICTION

The judgment of the court of appeals (R. 25–28) was entered on January 27, 1965. Motions for rehearing, vacation of judgment, acquittal, or new trial were denied on February 11, 1965. On February 15, 1965, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to and including April 12, 1965. The petition was filed on April 8, 1965, and granted on November 15, 1965, 382 U.S. 917 (R. 29–30). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it was constitutional for the court of appeals, without the intervention of a jury, to sentence petitioner to six months' imprisonment for having violated its order enforcing a Federal Trade Commission cease-and-desist order.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Article III, Section 2 of the United States Constitution provides in pertinent part:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

18 U.S.C. 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

STATEMENT

Petitioner was president and chairman of the board of the Holland Furnace Company ("Holland"), a corporation against which a Federal Trade Commission complaint issued on May 4, 1954. The complaint alleged that Holland, through its employees, was selling its products by means of false representations in

violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. On July 7, 1958, after a protracted hearing, the Federal Trade Commission found that Holland had violated the act through the use of unfair methods of competition and deceptive practices. *In the Matter of Holland Furnace Co.*, 55 F.T.C. 55. It ordered Holland "and its officers, agents, representatives, and employees" to cease and desist from (1) representing that its employees are inspectors or employees of government agencies or utility companies; (2) falsely representing that its salesmen are heating engineers; (3) falsely representing that competitors' furnaces are defective or not repairable and are likely to result in asphyxiation or fire, or that parts for such furnaces are unobtainable; (4) dismantling furnaces without the owner's permission; (5) falsely representing that the dismantled furnace could not be reassembled and used with safety; (6) requiring the furnace owner to sign a release absolving Holland of liability before reassembling a dismantled furnace; (7) refusing immediately to reassemble a dismantled furnace at the owner's request; and (8) misrepresenting the condition of any dismantled furnace (R. 2–3).

Holland thereupon filed in the Court of Appeals for the Seventh Circuit a petition to review and set aside this order. On August 5, 1959, on the Commission's motion supported by evidence showing continuation of the illegal practices during the pendency of the review proceeding, the court determined that enforcement of the Commission's order *pendente lite* was

necessary to prevent injury to the public and to petitioner's competitors. It thereupon directed Holland to comply with the Commission's order pending final judicial review (R. 3–4). On October 11, 1961, the court of appeals affirmed the Commission's decision and order. 295 F. 2d 302.[1]

In 1962, on petition of the Commission supported by affidavits relating alleged violations, the court of appeals issued an order to show cause why Holland should not be held in criminal contempt for violation of the court's order. On April 26, 1963, on petition of the attorneys appointed by the court to prosecute Holland (R. 7–9), the court issued a further order to petitioner and other officials of the corporation directing them to show cause why they should not individually be held in contempt for having "knowingly, wilfully and intentionally caused, and aided and abetted in causing" Holland to violate the court order (R. 4–5). Petitioner filed an answer denying the charge (R. 10). He also filed a demand for a jury trial, which was denied by the court of appeals after this Court's decision in *United States* v. *Barnett*, 376 U.S. 681 (R. 11–12, 14).

Pursuant to stipulation, the affidavits attached to the contempt petition and certain other documents were considered by respondents—a panel of judges of the Court of Appeals for the Seventh Circuit—in lieu of live testimony with regard to the charges

[1] Earlier, at Holland's request, the court separately determined whether the Commission had jurisdiction to enter its order. 269 F. 2d 203, certiorari denied, 361 U.S. 932.

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against Holland, which had requested judgment on the pleadings. Respondents also personally conducted a ten-day hearing dealing primarily with the complicity of petitioner and other company officials. Testimony was taken from live witnesses, and full rights of cross-examination and oral argument were allowed and exercised. On January 27, 1965, the court of appeals announced and issued its findings and conclusions of law, and entered its order fixing the punishments of those convicted. The court found beyond a reasonable doubt that Holland, through a "regular and usual" sales practice, had knowingly, wilfully and intentionally violated the order of August 1959 (R. 19). It also found beyond a reasonable doubt that petitioner knowingly, wilfully and intentionally caused and aided and abetted in causing Holland's violations; that he was Holland's dominant head until May 1962 and was well aware of the condemned sales practices and of the prohibitions of the order; and that he made no bona fide attempt to obtain compliance with the order but, instead, sought to give the appearance of compliance so as to insulate himself from liability while continuing the condemned sales practices (R. 19–22). The court sentenced petitioner to six months' imprisonment. The corporation was fined $100,000. Two officers were fined $500 each, and eight others were acquitted (R. 25–28). This court denied Holland's petition for a writ of certiorari. *Holland Furnace Co.* v. *Schnackenberg,* 381 U.S. 924.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner was convicted of having willfully violated an order of the court of appeals enforcing the determination of an administrative agency and was sentenced to six months' imprisonment. The only question before this Court is whether the failure to accord petitioner trial by jury on the contempt charge invalidates the judgment of conviction. The applicability of the constitutional jury trial guarantee to contempt proceedings has been considered by this Court on many occasions and, as recently as *United States* v. *Barnett,* 376 U.S. 681, the Court held that criminal contempt was not a "crime" within the meaning of the jury-trial guarantee of Article III and the Sixth Amendment. For reasons stated in greater detail in our brief and appendix in *Harris* v. *United States,* No. 6, this Term (382 U.S. 162), we disagree with the suggestion made in a *dictum* of some members of the Court (376 U.S. 681, 695, n. 12) that the jury-trial guarantee is applicable if the sentence exceeds that prescribed for petty offenses.

A. The principal issue remaining to be considered is whether there is any contemporary justification for departing from the settled rule that criminal contempts are triable by the court. In our combined brief in *Shillitani* v. *United States,* No. 412, this Term, certiorari granted, 382 U.S. 913, and *Pappadio* v. *United States,* No. 442, this Term, certiorari granted, 382 U.S. 916, which we have served on petitioner, we explain, in some detail, why we believe that violations of

judicial commands warrant different procedures from those applicable to violations of legislative commands. That discussion is relevant here, and we respectfully refer the Court to that brief in its consideration of the present case.

B. The problem presented by a violation of a judicial decree enforcing an agency order illustrates the policy considerations discussed in our *Shillitani* and *Pappadio* brief. Even though violations of such decrees may present issues of fact (which refusal to testify rarely does), they differ substantially from the ordinary "criminal prosecutions" contemplated by the Constitutional framers. Before there can be a contempt proceeding for violation of an administrative order, the particular conduct proscribed must be specifically defined with the assistance of counsel through agency action and court order for enforcement. This degree of administrative and judicial refinement, specificity and warning distinguishes this type of violation from an ordinary criminal prosecution and provides a safeguard against arbitrary action.

In addition, civil contempt is an inadequate means of achieving the result which Congress intended when it established the usual procedure for review and enforcement of administrative orders. Compliance with most agency orders requires future adherence to or avoidance of a course of conduct, and this cannot be policed by anticipatory coercive imprisonment in the form of civil contempt. Moreover, since civil contempt may be invoked only after the *court's* order has once

been violated, and since the agency order must, in turn, be based on an earlier violation, civil contempt can have preventive effect only upon the *third* violation of the statutory command. In order effectively to prevent a *second* violation—*i.e.*, any repetition of the conduct which resulted in the agency order—a speedy and certain sanction must be imposed in case of violation. That, we submit, calls for judicial power to deal with the violation of the court's order.

C. In light of the serious and deliberate character of the contempt, the sentence imposed in this case was clearly reasonable.

ARGUMENT

I

A CRIMINAL CONTEMPT PROCEEDING IS NOT A "CRIMINAL PROSECUTION" IN THE CONSTITUTIONAL SENSE

Our briefs in *United States* v. *Barnett*, 376 U.S. 681, No. 107, O.T. 1963, and in *Green* v. *United States*, 356 U.S. 165, No. 100, O.T. 1957, survey the decisions of this Court and the historical evidence regarding the intention of the Constitutional draftsmen with respect to the procedures to be followed in the trial of criminal contempts. This Court concluded in *Green* and *Barnett* that the consistent line of decisions and the historical proof "establish beyond peradventure that criminal contempts are not subject to jury trial as a matter of constitutional right." 356 U.S. at 183; 376 U.S. at 692.

In our brief and appendix in *Harris* v. *United States,* No. 6, this Term (382 U.S. 162), we discuss the historical evidence relating to the proposition—first suggested in a dissenting opinion in the *Barnett* case, 376 U.S. at 739–757—that "criminal contempts were tried without a jury at the time of the Constitution * * * because they were deemed a species of petty offense punishable by trivial penalties." 376 U.S. at 751–752. We submit that the proposition is historically unsound and, for reasons elaborated in our *Harris* brief (which has been served on petitioner), it does not warrant even the limited recognition accorded it by the *dictum* of some members of the Court in *United States* v. *Barnett,* 376 U.S. 681, 695, n. 12.

We believe that there are, in the administration of a legal system such as ours, sound reasons of policy to support a distinction between appropriate procedures for violations of judicial orders on the one hand and legislative commands on the other. Our combined brief in *Shillitani* v. *United States,* No. 412, this Term, and *Pappadio* v. *United States,* No. 442, this Term, contains a full discussion of the differences which, in our view, justify jury trial for statutory violations but not for disobedience of court orders. The statements of Constitutional draftsmen regarding the importance of the jury trial guarantee (several of which are quoted in petitioner's brief, pp. 7–11) must be read, in light of this distinction, as referring only to trials on charges of statutory violations. Criminal contempts are based upon disobedi-

ence of court orders and, for the reasons stated in our *Shillitani* and *Pappadio* brief (pp. 18–33)—which we consider fully applicable to this case—more immediate and certain sanctions are warranted when court orders are violated than when statutory commands are disregarded.

II

JURY TRIAL IS INAPPROPRIATE IN A CRIMINAL CONTEMPT PROCEEDING BASED ON A JUDICIALLY ENFORCED ORDER OF AN ADMINISTRATIVE AGENCY

The present case illustrates, in a setting different from *Shillitani* and *Pappadio,* how inappropriate trial by jury is in a criminal contempt proceeding. Petitioner was charged with having violated a court order which enforced, *pendente lite,* an order of an administrative agency. The judicial command which was disobeyed is typical of a large class of court orders customarily issued in those spheres of our society which Congress has committed to the control of regulatory agencies. Since the Interstate Commerce Act of 1887, many expert agencies have been created to hear and determine facts and issue orders implementing general legislative policies in particular factual situations. These agencies—such as the Federal Trade Commission, the National Labor Relations Board, the Interstate Commerce Commission, and the Federal Power Commission, among others—have no power themselves to punish disobedience of their orders. *Interstate Commerce Commission* v. *Brimson,* 154 U.S. 447. They must seek enforcement

through the courts. Consequently, after an administrative order has issued, it may be reviewed judicially in a court of appeals or a three-judge district court, and that court, if it sustains the legal and factual basis of the order, enforces it by judicial decree. Violations of agency orders do not ordinarily become subject to the contempt power until the decision of the agency has been reviewed by a court.[2] A long legal proceeding in which facts and specific issues have been determined usually precedes an enforcement order, and only if the order is thereafter violated does the question of contempt arise. In this very case, extensive hearings over a four-year period, resulting in a transcript of more than 8,000 pages, preceded the cease-and-desist order. The injunction was issued a year later on the basis of additional affidavits showing extensive violations during the pendency of the appeal.

The efficacy of this two-stage process is based, we submit, on the premise that the particularized court order, when it is ultimately issued, will inescapably be obeyed and that it will have more immediate effect than the threat of a criminal prosecution. It is the duty of the administrative agency "initially [to] apply a broad statutory term to a particular situation," and the function of the reviewing court "is limited to determining whether the [agency's] decision 'has

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[2] In this case, of course, enforcement *pendente lite* was ordered because Holland was shown to have continued the illegal practices while review was pending, and petitioner was found to have violated the interlocutory order. When the merits were considered, however, the court sustained the Commission and entered a final decree making permanent its *pendente lite* order.

"warrant in the record" and a reasonable basis in law.'" *Atlantic Refining Co.* v. *Federal Trade Commission*, 381 U.S. 357, 367. Once the court determines that the agency's order meets these standards, it must cooperate with the agency "both at the enforcement and the contempt stages in order to effectuate [the governing statute's] purposes." *National Labor Relations Board* v. *Warren Co.*, 350 U.S. 107, 112.

The statutory scheme devised by Congress for the enforcement of agency orders demonstrates that what was contemplated cannot readily be carried into effect if violations of court enforcement orders may be tried only by the procedures prescribed for ordinary criminal trials—including the right to a jury. Congress did not merely attach a criminal or civil penalty to any violation of an agency order sustained by a reviewing court. Compare, *e.g.*, 15 U.S.C. 21(l), 45(l), which prescribe a "civil penalty" for each separate violation of a Federal Trade Commission order. It chose instead to implement the agency's decision by requiring the reviewing court to enter a judicial decree which carries contempt penalties. This Court observed in *National Labor Relations Board* v. *Warren Co.*, 350 U.S. 107, 112–113, that Congress "gave the judicial remedy of contempt as the ultimate sanction to secure compliance with [agency] orders" because "so long as compliance is not forthcoming [the statute's] objective is frustrated." Criminal contempt cannot be treated as an ordinary criminal prosecution if the contempt power is to mean more

in such circumstances than a bare criminal or civil penalty would.[3]

Under established principles, an agency may enter an order such as the one involved in this case only after a violation of law has been committed. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470. If the contempt power were to mean that a second violation, committed after enforcement had been ordered, would be treated no differently from an ordinary criminal act, the "judicial remedy of contempt" would be indistinguishable from a pure criminal sanction for violation of final agency orders. Indeed, since punishment would be imposed only after two violations had occurred, the applicable statute, in conjunction with the administrative remedy, would be substantially less effective as a deterrent than a bare criminal statute.[4] The compliance which Congress sought to secure by affording "the ultimate sanction" of contempt is surely not encouraged if the only coercion available is identical to that of a criminal statute.

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[3] See Note, *The Role of Contempt Proceedings in Enforcing Orders of the NLRB*, 54 Col. L. Rev. 603; Jaffe, *Judicial Control of Administrative Action* (1965), p. 305.

[4] The Federal Trade Commission, for example, is authorized to enter a cease-and-desist order against anyone engaged in false advertising of foods, drugs and cosmetics in interstate commerce. 15 U.S.C. 52. The content of the applicable provision is not substantially different from the content of the mail-fraud statute, 18 U.S.C. 1341, and anyone sending false advertising of the sort covered by 15 U.S.C. 52 through the mail would be subject to the criminal provision and could be punished criminally for his first violation.

Nor is civil contempt a practical alternative course "to secure compliance."[5] This Court has recognized that "whether the proceedings be civil or criminal, there must be an allegation that in contempt of court the defendant has disobeyed the order * * *." *Gompers* v. *Buck Stove & Range Co.*, 221 U.S. 418, 441. A court enforcing an agency's order against a corporation may not, in other words, immediately imprison its officers until the order is obeyed or assess civil fines for anticipated noncompliance which has not yet occurred; it must wait until a violation of the *court's* order is committed. This means that civil contempt might be an effective means of deterring a *third* violation, but it would be quite useless with regard to the *second*. Moreover, many orders do not lend themselves to effective enforcement by civil contempt. The order involved in this case, for example, imposes a duty to refrain from certain conduct. The court could hardly imprison the corpo-

[5] There is no merit whatever to petitioner's contention (Br. 11–15) that criminal contempt is unavailable when the order allegedly violated is one enforcing an administrative agency's order. The offense committed is the violation of the *court's* order, and the evidentiary rules which governed the proceedings underlying that order do not limit the permissible remedy for its violation. Neither *National Labor Relations Board* v. *Mastro Plastics Corp.*, 261 F. 2d 157 (C.A. 2), which involved a situation in which the court of appeals believed civil contempt to be an adequate remedy, nor any other decision cited by petitioner supports the claim that criminal contempt powers may not be invoked. In any event, the contention that criminal contempt could not be used in these circumstances is not comprehended by the question to which this Court limited its grant of certiorari (R. 29).

ration's officers to assure future compliance with an order having indefinite duration.

The efficacy of the contempt sanction is its threat of prompt and certain enforcement, and it is that threat which coerces compliance. Neither civil contempt—which, in the case of agency orders, is inoperative before the third violation and may often be ineffective—nor an ordinary criminal sanction involving standard criminal procedures can insure the compliance necessary to carry out the governing statute's objective. Criminal contempt proceedings conducted by the court provide the sure and prompt remedy which is appropriate in such circumstances.

Those who are accused of having violated judicial enforcement orders in situations of this sort cannot really complain of summary procedures. Unlike ordinary criminal defendants, they have had the opportunity of refining, in administrative and judicial proceedings, the legal and factual issues underlying the duty imposed upon them by law. They have been represented by counsel during these initial stages and have been able to interpose, at no risk whatever, such personal defenses and circumstances peculiar to their own situations as they deem relevant. They have been personally ordered to conduct themselves in a specific manner,[6] and have had the opportunity—before being placed under a legal obligation to obey—to test the legal sufficiency of the order which im-

[6] It is true here that the Commission proceedings were instituted solely against Holland and that petitioner was not a party to the administrative proceeding or to the original proceeding in the court of appeals. But petitioner was its president and chairman of its board of directors. As this Court has

poses the duty upon them. If they entertained doubts as to the meaning of an order, they have been able to seek clarification from the courts. *Regal Knitwear Co.* v. *National Labor Relations Board*, 324 U.S. 9, 15. When charged with contemptuous violation of the court order they have the right, which petitioner in this case exercised, to a hearing before the court as plenary in every respect as in a criminal prosecution, except for the presence of a jury. In sum, a criminal prosecution is significantly different from criminal contempt proceedings pursuant to judicial enforcement of an administrative order. In the latter situation, the only open question is whether the order was disobeyed; the detailed application of the law to the facts has been litigated and conclusively determined. The substantially greater degree of specificity and warning distinguishes the contempt situation from an ordinary "criminal prosecution" and provides a safeguard against the dangers which trial by jury is intended to forestall.

It is also evident that in relying upon the courts of appeals to enforce their own orders through contempt proceedings, Congress did not contemplate a jury trial. Courts of appeals are not designed for jury

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said in a different context: "A command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the writ directed to the corporation, prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience and may be punished for contempt." *Wilson* v. *United States*, 221 U.S. 361, 376. Even a cursory reading of this record shows that the court of appeals was fully justified in finding deliberate violation by petitioner personally.

trials. If juries were constitutionally required in these cases, jury machinery would have to be created or, at best, adapted from that used by the district courts. This would probably involve a serious disruption of the appellate court's usual business. This case strikingly illustrates, as well, that if issues of fact exist, they must be determined with awareness of the facts underlying the violated order. It is both unseemly and unsound to permit an order issued by an administrative agency and approved by a court of appeals to depend, for effective enforcement, upon the votes of twelve jurors, one of whom may be unsympathetic or unable to understand the underlying facts.

Nor does an alleged contemnor in such a situation face a single judge acting as "lawmaker, prosecutor, judge, jury and disciplinarian." He is tried by a three-judge panel which is neither a lawmaker nor a prosecutor. The court need not be in sympathy with the underlying order; its duty is to enforce it if it meets the legal standards. In these circumstances, it cannot be accused of having prejudged the question of guilt. More so even than when the order is a discretionary one with the Court, as it was in *United States* v. *Shipp,* 203 U.S. 563, can it be said that (203 U.S. at 574, Holmes, J.): "The court is not a party. There is nothing that affects the judges in their own persons. Their concern is only that the law should be obeyed and enforced, and their interest is no other than that they represent in every case."

We also note that Congress may, in the exercise of its legislative judgment, protect against abuses

by providing a different procedure. In this area, Congress has not been blind to possibilities of abuse; it has often defined and limited the contempt power. The actions of a single judge prompted a restriction in 1831 on the nature of acts punishable as contempt (4 Stat. 487). The abuse of labor injunctions led to further limitation in the Clayton Act in 1914 (38 Stat. 738) and in the Norris-LaGuardia Act in 1932 (47 Stat. 70).[7] Congress obviously has not felt that the contempt power has been abused in judicial enforcement of agency action. The method utilized has the sanction of over one hundred and fifty years of history, and it is consistent with constitutional protections for "criminal prosecutions."

III

PETITIONER'S SENTENCE IS REASONABLE

A majority of the Justices agreed in *Barnett,* 376 U.S. 695, n. 12, that a six months' sentence for criminal contempt—being a "penalty provided for petty of-

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[7] Until 1924, there was doubt that a jury could be required in a contempt case because it was feared that "there would be no power to enforce [the court's] order if they were disregarded in such independent investigation." *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 450. These doubts were set to rest in *Michaelson* v. *United States*, 266 U.S. 42, which held that the Clayton Act, in requiring a jury trial for certain specified contempts did not materially interfere with the inherent contempt power of the court. This Court held that a jury trial might be made mandatory in a contempt case provided that "the attributes which inhere in that power and are inseparable from it" are neither "abrogated nor rendered practically inoperative." 266 U.S. at 66.

fenses" by 18 U.S.C. 1—would not, in their view, encounter constitutional objection. It may therefore be said that the sentence in the instant case is constitutionally permissible even under the more restrictive view of the contempt power to which some members of that majority subscribed.

We do not rest, however, on the proposition that the sentence here is constitutionally permissible because its duration is six months. We believe that the fundamental issue would not be different if the imprisonment had been for one month or for one year. We doubt, as explained at length in the government's brief in the *Harris* case, that there is a true analogy, whether the matter is viewed historically or in terms of the relevant policy considerations, between a deliberate and serious contempt on the one hand and a typical petty offense on the other. We are mindful, moreover, that this Court has held that an offense (reckless driving) which was punishable by no more than 30 days' imprisonment could not be regarded as a petty offense in the constitutional sense because the charge was one characterized by moral delinquency. *District of Columbia* v. *Colts*, 282 U.S. 63.* So far as

* It has consistently been the Court's view that whether an offense amounts to a "crime" in the constitutional sense or is merely a "petty offense" for which no jury is required depends "primarily upon the nature of the offense." *District of Columbia* v. *Colts*, *supra*, at 73. Neither the fact that the maximum punishment authorized by the statute is not severe nor the fact that the defendant actually was given a minor penalty is sufficient of itself to remove the offense involved from the constitutional category of "crimes." See *Callan* v. *Wilson*, 127 U.S.

the constitutional issue is concerned, our reliance remains with the proposition, accepted throughout the entire course of this nation's history, that contempt is not a crime in the sense of Article III or of the Sixth Amendment.

So saying, we do not imply that this Court should not exercise (as it has done in times past) its reviewing power in order to determine in a particular case whether the sentence imposed for a contempt is excessive. And in this respect, of course, it is relevant to consider that Congress has regarded a six months' sentence as permissible even in the case of a petty offense. 18 U.S.C. 1(3).*

On the facts found by the court of appeals in the instant case, the contempt was both deliberate and serious. Petitioner was deeply implicated in a calculated effort to evade an order which had its origin in commercial practices that, by any standard, were thoroughly sordid, reprehensible and injurious to the public. Accordingly, we have no doubt of the reasonableness of the sentence and believe that there is no need to elaborate upon the underlying facts as made manifest in the opinions of the administrative agency and of the reviewing court.

540; *Schick* v. *United States*, 195 U.S. 65; *District of Columbia* v. *Clawans*, 300 U.S. 617.

* It may also be noted that the contempt sentence imposed upon the Holland corporation (*Holland Furnace Co.* v. *Schnackenberg*, 341 F. 2d 548, certiorari denied, 381 U.S. 924) was far in excess—indeed, some two hundred times in excess—of the $500 fine described in 18 U.S.C. 1 as the limit for petty offenses.

CONCLUSION

It is respectfully submitted that the judgment below should be affirmed.

RALPH S. SPRITZER,
*Acting Solicitor General.**

FRED M. VINSON, JR.,
Assistant Attorney General.

NATHAN LEWIN,
Assistant to the Solicitor General.

BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys.

J. B. TRULY,
E. K. ELKINS,
MILES J. BROWN,
*Attorneys.***

FEBRUARY 1966.

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*In lieu of the Solicitor General, who has disqualified himself.

**The above-named attorneys of the Federal Trade Commission were appointed to prosecute this case on behalf of the court of appeals.

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SUPREME COURT OF THE UNITED STATES

No. 67.—October Term, 1965.

Paul Theodore Cheff, Petitioner, v. Elmer J. Schnackenberg et al. } On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 6, 1966.]

Mr. Justice Clark announced the judgment of the Court and delivered an opinion in which The Chief Justice, Mr. Justice Brennan and Mr. Justice Fortas join.

This is a companion case to No. 412, *Shillitani* v. *United States*, and No. 442, *Pappadio* v. *United States*, decided today. Unlike those cases, this is a criminal contempt proceeding.

Upon petition of the Federal Trade Commission, Cheff was charged, along with Holland Furnace Company and 10 other of its officers, with criminal contempt of the Court of Appeals for the Seventh Circuit. The alleged contemnors were tried before a panel of three judges of the Court of Appeals without a jury. The corporation and three of its officers, including Cheff, were found guilty of violating a previous order of that court. Cheff, a former president and chairman of the board of Holland, was sentenced to six months' imprisonment; the other two officers were fined $500 each; and the corporation was fined $100,000. The remaining eight individuals were acquitted. 341 F. 2d 548. Cheff and Holland petitioned for certiorari. We denied Holland's petition, 381 U. S. 924, and granted Cheff's, limited to a review of the question whether, after a denial of a demand for a jury, a sentence of imprisonment of six months is constitutionally permissible under Article III and the Sixth Amendment. 382 U. S. 917. We hold that Cheff was not entitled to a jury trial and affirm the judgment.

I.

The case had its inception in proceedings before the Federal Trade Commission where, in 1954, complaints were issued against Holland charging it with unfair methods of competition and deceptive trade practices in connection with the sale of its products. After extensive hearings, the Commission issued a cease-and-desist order against Holland "and its officers, agents, representatives and employees" prohibiting the continuance of practices the Commission found illegal. *In the Matter of Holland Furnace Company*, 55 F. T. C. 55 (1958).

Holland petitioned the Court of Appeals to review and set aside the order of the Commission. Soon thereafter the Commission, claiming that Holland was continuing to violate its order, moved the Court of Appeals for a *pendente lite* order requiring compliance. On August 5, 1959, the court issued an order commanding Holland to "obey and comply with the order to cease and desist . . . until and unless said order shall be set aside upon review by this Court or by the Supreme Court of the United States . . . ." This order forms the basis of this criminal contempt proceeding. Meanwhile, Holland's petition for review was decided adversely to the corporation. In separate opinions, the Court of Appeals upheld the jurisdiction of the Commission to enter its cease-and-desist order, 269 F. 2d 203 (1959), and affirmed on the merits, 295 F. 2d 302 (1961).

In March 1962 the Commission petitioned the Court of Appeals to enter a show cause order against Holland for contempt of its *pendente lite* order. A rule was issued and attorneys appointed to prosecute on behalf of the court. Thereafter, in April 1963, rules were issued against Cheff and the other officers, as individuals, to show cause why they should not be held in criminal contempt "by reason of having knowingly, wilfully and

intentionally caused, and aided and abetted in causing, respondent Holland Furnace Company to violate and disobey, and fail and refuse to comply with" the order of August 5, 1959. Cheff demanded a jury trial, which was denied, and following a full hearing extending over a 10-day period the court found him guilty. As we have stated, a sentence of six months was imposed. In accordance with the limited grant of certiorari, there is no issue here as to the sufficiency of the hearing, excepting the absence of a jury.

II.

Cheff first contends that contempt proceedings in the Court of Appeals which stem from administrative law enforcement proceedings are civil, rather than criminal, in nature. This may be true where the purpose of the proceeding is remedial. Cf. *Shillitani* v. *United States*, *ante*, at p. —. Within the context of the question before us, however, the contention is irrelevant, for a jury trial is not required in civil contempt proceedings, as we specifically reaffirm in *Shillitani*, *supra*. In any event, the contention is without merit. The purpose of the proceedings against Cheff could not have been remedial for he had severed all connectio..s with Holland in 1962, long before the contempt proceedings were instituted against him. He had no control whatever over the corporation and could no longer require any compliance with the order of the Commission. Moreover, as Cheff himself points out, the corporation "had completely withdrawn from the business of replacement of furnaces, which is the area in which the violation is alleged." There was, therefore, an "absence of any necessity of assuring future compliance" which made the six-month sentence "entirely punitive." Brief for Petitioner, p. 16.

There can be no doubt that the courts of appeals have the power to punish for contempt. 18 U. S. C. § 401

(1964 ed.). See, *e. g.*, cases cited in *United States* v. *Barnett*, 376 U. S. 681, 694, n. 12 (1964). And it matters not that the contempt arises indirectly from proceedings of an administrative agency. Cheff was found in contempt of the Court of Appeals, not the Commission. The sole ground for the contempt proceedings is stated in the initial order served on Cheff and the other parties to show cause why they should not be adjudged in criminal contempt of *that* court, for violations of *that* court's *pendente lite* order. Indeed, Cheff's answer itself verified that he had not violated, disobeyed, and failed and refused to comply with *"an order of the United States Court of Appeals for the Seventh Circuit entered on August 5, 1959 . . . ."* (Italics added.) In addition, the Court of Appeals itself was quite specific in limiting the contempt charges to "cover the period from August 5, 1959 to the entry of the final judgment [in October 1961] by this court." 341 F. 2d, at 550. As the court clearly had the authority to enter its interlocutory order, 15 U. S. C. § 45 (c) (1964 ed.), it follows that the court has the power to punish for contempt any disobedience of that order.

Cheff's next and chief contention is that criminal contempt proceedings are criminal actions falling within the requirements of Article III and the Sixth Amendment of the Constitution.* Only two Terms ago we held to the contrary in *United States* v. *Barnett, supra;* however, some members of the Court were of the view there that, without regard to the seriousness of the offense, punishment by summary trial without a jury

*The relevant portions of these provisions declare:

"The trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ." Art. III, § 2.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." Sixth Amendment.

would be constitutionally limited to that penalty provided for petty offenses. 376 U. S., at 694, n. 12. Cheff, however, would have us hold that the right to jury trial attaches in all criminal contempts and not merely in those which are outside the category of "petty offenses."

Cheff's argument is unavailing, for we are constrained to view the proceedings here as equivalent to a procedure to prosecute a petty offense, which under our cases does not require a jury trial. Over 75 years ago in *Callan* v. *Wilson*, 127 U. S. 540, 557 (1888), this Court stated that "in that class or grade of offences called petty offences, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose," a jury trial is not required. And as late as 1937 the Court reiterated in *District of Columbia* v. *Clawans*, 300 U. S. 617, 624, that: "It is settled by the decisions of this Court . . . that the right of trial by jury . . . does not extend to every criminal proceeding. At the time of the adoption of the Constitution there were numerous offenses, commonly described as 'petty,' which were tried summarily without a jury . . . ." See also *Natal* v. *Louisiana*, 139 U. S. 621 (1891); *Lawton* v. *Steele*, 152 U. S. 133, 141–142 (1894); *Schick* v. *United States*, 195 U. S. 65, 68–72 (1904); *District of Columbia* v. *Colts*, 282 U. S. 63, 72–73 (1930). Indeed, Mr. Justice Goldberg, joined by THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS, took the position in his dissenting opinion in *United States* v. *Barnett*, *supra*, at 751, that "at the time of the Constitution all types of 'petty' offenses punishable by trivial penalties were generally triable without a jury. This history justifies the imposition without trial by jury of no more than trivial penalties for criminal contempts."

According to 18 U. S. C. § 1 (1964 ed.), "any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months" is a "petty offense."

Since Cheff received a sentence of six months' imprisonment (see *District of Columbia* v. *Clawans*, *supra*, at 627–628), and since the nature of criminal contempt, an offense *sui generis*, does not, of itself, warrant treatment otherwise (cf. *District of Columbia* v. *Colts*, *supra*), Cheff's offense can be treated only as "petty" in the eyes of the statute and our prior decisions. We conclude therefore that Cheff was properly convicted without a jury. At the same time, we recognize that by limiting our opinion to those cases where a sentence not exceeding six months is imposed we leave the federal courts at sea in instances involving greater sentences. Effective administration compels us to express a view on that point. Therefore, in the exercise of the Court's supervisory power and under the peculiar power of the federal courts to revise sentences in contempt cases, we rule further that sentences exceeding six months for criminal contempt may not be imposed by federal courts unless a jury trial has been received or waived. Nothing we have said, however, restricts the power of a reviewing court, in appropriate circumstances, to revise sentences in contempt cases tried with or without juries.

The judgment in this case is

Affirmed.

MR. JUSTICE STEWART, joining Part I of MR. JUSTICE HARLAN'S separate opinion, concurs in result.

MR. JUSTICE WHITE took no part in the decision of this case.

SUPREME COURT OF THE UNITED STATES

Nos. 67, 412 AND 442.—OCTOBER TERM, 1965.

Paul Theodore Cheff, Petitioner, 67 v. Elmer J. Schnackenberg et al.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.
Salvatore Shillitani, Petitioner, 412 v. United States of America.	On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.
Andimo Pappadio, Petitioner, 442 v. United States of America.	

[June 6, 1966.]

MR. JUSTICE HARLAN, concurring in the result in No. 67 and dissenting in Nos. 412 and 442.

By each of its opinions in these cases, the Court inaugurates a new limitation on the use of the federal contempt power. In *Cheff*, it is announced that prison sentences for criminal contempt in a federal court must be limited to six months unless the defendant is afforded a trial by jury. In *Shillitani* and *Pappadio*, an automatic "purge" clause and related indicia are found to convert a criminal sentence into a civil sanction which cannot survive the grand jury's expiration. I believe these limitations are erroneous in reasoning and result alike.

I.

The Court's decision to extend the right to jury trial to criminal contempts ending in sentences greater than six months is the product of the views of four Justices who rest that conclusion on the Court's supervisory power and those of two others who believe that jury trials are constitutionally required in all but "petty" criminal contempts. The four Justices who rely on the

supervisory power also find the constitutional question a "difficult" one. *Ante*, p. —. However, as recently as 1958, this Court in *Green* v. *United States*, 356 U. S. 165, unequivocally declared that the prosecution of criminal contempts was not subject to the grand and petit jury requirements of Art. III, § 2, of the Constitution and the Fifth and Sixth Amendments. This doctrine, which was accepted by federal judges in the early days of the Republic [1] and has been steadfastly adhered to in case after case in this Court,[2] should be recognized now

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[1] *E. g., Ex parte Burr*, 4 Fed. Cas. 791, 797 (No. 2,186) (C. C. D. C. 1823) (Cranch, C. J.):

"[C]ases of contempt of court have never been considered as crimes within the meaning and intention of the second section of the third article of the constitution of the United States; nor have attachments for contempt ever been considered as criminal prosecutions within the sixth amendment. . . . Many members of the [constitutional] convention were members of the first congress, and it cannot be believed that they would have silently acquiesced in so palpable a violation of the then recent constitution as would have been contained in the seventeenth section of the judiciary act of 1789 (1 Stat. 73),—which authorizes all the courts of the United States 'to punish by fine and imprisonment, at the discretion of the said courts, all contempts of authority in any case or hearing before the same,'—if their construction of the constitution had been that which has, in this case, been contended for at the bar."

[2] See *Ex parte Terry*, 128 U. S. 289, 313 (1888) (Harlan, J.); *Savin, Petitioner*, 131 U. S. 267, 278 (1889) (Harlan, J.); *Eilenbecker* v. *Plymouth County*, 134 U. S. 31, 36 (1890) (Miller, J.); *Interstate Commerce Comm'n* v. *Brimson*, 154 U. S. 447, 489 (1894) (Harlan, J.); *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 336–337 (1904) (Brewer, J.); *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 450 (1911) (Lamar, J.); *Gompers* v. *United States*, 233 U. S. 604, 610–611 (1914) (Holmes, J.); *Ex parte Hudgings*, 249 U. S. 378, 383 (1919) (White, C. J.); *Myers* v. *United States*, 264 U. S. 95, 104–105 (1924) (McReynolds, J.); *Michaelson* v. *United States*, 266 U. S. 42, 67 (1924) (Sutherland, J.); *Ex parte Grossman*, 267 U. S. 87, 117–118 (1925) (Taft, C. J.); *Fisher* v. *Pace*, 336 U. S. 155, 159–160 (1949) (Reed, J.); *Offutt* v. *United States*, 348 U. S. 11, 14 (1954) (Frankfurter, J.).

as a definitive answer to petitioners' constitutional claims in each of the cases before us.

The prevailing opinion's new supervisory-power rule seems to me equally infirm. The few sentences devoted to this dictum give no reason why a six-month limitation is desirable. Nor is there anything about the sentences actually imposed in this instance that warrants reappraisal of the present practice in contempt sentencing. In *Cheff* itself the sentence was for six months. *Shillitani* and *Pappadio* involved two-year sentences but each was moderated by a purge clause and seemingly in neither case were there disputed facts suitable for a jury. Among the prominent shortcomings of its new rule, which the Court simply disregards, is the difficulty it may generate for federal courts seeking to implement locally unpopular decrees. Another problem is in administration: to decide whether to proffer a jury trial, the judge must now look ahead to the sentence, which itself depends on the precise facts the trial is to reveal.

In my view, before this Court improvises a rule necessarily based on pure policy that largely shrugs off history, a far more persuasive showing can properly be expected.

II.

No less remarkable is the Court's upsetting of the sentences in *Shillitani* and *Pappadio* on the ground that the jailings were really for civil contempt which cannot endure beyond the grand jury's term.[3] It can hardly be suggested that the lower courts did not intend to invoke the criminal contempt power to keep the respondents in jail after the grand jury expired; the

[3] This question was never raised in *Pappadio* nor encompassed by the limited grant of certiorari in that case, see 382 U. S. 916; in *Shillitani*, where the issue is properly before the Court, petitioner filed a certiorari petition discussing the point but tendered no brief on the merits on any phase of the case.

contrary is demonstrated by the entire record.[4] Instead, the Court attempts to characterize the proceedings by a supposed primary or essential "purpose" and then lops off so much of the sentences as do not conform to that purpose. What the Court fails to do is to give any reason in policy, precedent, statute law, or the Constitution for its unspoken premise that a sentencing judge cannot combine two purposes into a single sentence of the type here imposed.

Without arguing about which purpose was primary, obviously a fixed sentence with a purge clause can be said to embody elements of both criminal and civil contempt. However, so far as the safeguards of criminal contempt proceedings may be superior to civil, the respondents have not been disadvantaged in this regard, nor do they claim otherwise. Adding a purge clause to a fixed sentence is a benefit for the respondents, not a reason for complaint. Similarly the public interest is served by exerting strong pressure to obtain answers while tailoring the length of imprisonment so that it may punish the defendant only for his period of recalcitrance and no more. I see no reason why a fixed sentence with an automatic purge clause should be deemed impermissible.

For the foregoing reasons, I would affirm the judgments in all three cases on the basis of *Green* and leave the authority of that case unimpaired.[5]

MR. JUSTICE STEWART joins Part I of this opinion.

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[4] For example, in each case the Judgment and Commitment states that "the defendant is guilty of criminal contempt" and orders him committed "for a period of Two (2) Years, or until further order of this Court," should the questions be answered before the sentence and the grand jury expire.

[5] The two-year sentences imposed on Shillitani and Pappadio do not call for the exercise of this Court's corrective power over contempt sentences, see *Green*, 356 U. S., at 187–189; as has been noted, both sentences carried purge clauses.

SUPREME COURT OF THE UNITED STATES

No. 67.—October Term, 1965.

Paul Theodore Cheff, Petitioner, v. Elmer J. Schnackenberg et al. } On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 6, 1966.]

Mr. Justice Douglas, with whom Mr. Justice Black concurs, dissenting.

I adhere to the view expressed in the dissents in *Green* v. *United States*, 356 U. S. 165, 193, and *United States* v. *Barnett*, 376 U. S. 681, 724, 728, that criminal contempt is a "crime" within the meaning of Art. III, § 2 of the Constitution and a "criminal prosecution" within the meaning of the Sixth Amendment, both of which guarantee the right to trial by jury in such cases.[1] Punishment for contempt was largely a minor affair at the time the Constitution was adopted, the lengthy penalties of the sort imposed today being a relatively recent innovation.[2] I do not see how we can any longer tolerate an

[1] Although the Sixth Amendment uses somewhat different language than that of Art. III, § 2, there is no reason to believe that the Sixth Amendment was intended to work a change in the scope of the jury trial requirement of Article III. See Frankfurter and Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv. L. Rev. 917, 968–975 (1926).

[2] *Green* v. *United States*, *supra*, at 207–208 and n. 21 (dissenting opinion); *United States* v. *Barnett*, *supra*, at 740–749 (dissenting opinion). Although Justice Goldberg's use of historical materials in *Barnett* has been subjected to some criticism (see, *e. g.*, Tefft, United States v. Barnett: "'Twas a Famous Victory," Supreme Court Review 123, 132–133 (1964); Brief for the United States 27–58 and Appendix, *passim*, *Harris* v. *United States*, 382 U. S. 162), severe penalties in contempt cases in the early days appear, nonetheless, to have been the exception.

"exception" to the historic guaranty of a trial by jury when men are sent to prison for contempt for periods of as long as four years.[3] Nor do the consequences of a contempt conviction necessarily end with the completion of serving what may be a substantial sentence. Indeed the Government regards in other contexts that a criminal contempt conviction is the equivalent of a conviction of other serious crimes.

Thus the Attorney General, in an advisory letter dated January 26, 1966, to Deputy Secretary of Defense Cyrus R. Vance concluded that a conviction for criminal contempt could properly be applied to exclude an Army veteran from burial in Arlington National Cemetery. Exclusion was based on a regulation (30 Fed. Reg. 8996) which denies burial in a national cemetery to a person "who is convicted in a Federal . . . court of a *crime or crimes*, the result of which is . . . a sentence to imprisonment for 5 years or more . . . ." The Attorney General stated: "Criminal contempt is regarded as a 'crime' for most purposes [citing cases], and no reason is apparent why, for purposes of the interment regulation, criminal contempt should be distinguished from any other infraction of law punishable by imprisonment."

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[3] See, *e. g.*, *Brown* v. *United States*, 359 U. S. 41 (15 months); *Piemonte* v. *United States*, 367 U. S. 556 (18 months); *Reina* v. *United States*, 364 U. S. 507 (two years); *Green* v. *United States*, *supra* (three years); *Collins* v. *United States*, 269 F. 2d 745 (three years); *United States* v. *Thompson*, 214 F. 2d 545 (four years).

In the fiscal year ending June 30, 1962, a total of 21 people convicted by a federal court of contempt were received by the federal prison system. Of these, the *average* sentence was 6.4 months. Sentences of eight of these prisoners exceeded six months; three prisoners had sentences exceeding one year, and of these two prisoners had sentences of two years or more. The Federal Prison System—1964, Hearings before the Subcommittee on National Penitentiaries of the Senate Committee on the Judiciary, 88th Cong., 2d Sess. (Jan. 22, 1964), p. 10.

There is in my view no longer any warrant for regarding punishment for contempt as a minor matter, strictly between the court and the accused. "We take a false and one-sided view of history when we ignore its dynamic aspects. The year books can teach us how a principle or a rule had its beginnings. They cannot teach us that what was the beginning shall also be the end." Cardozo, The Growth of the Law, 104–105 (1924).

II.

The prevailing opinion today suggests that a jury is required where the sentence imposed exceeds six months but not when it is less than that period. This distinction was first noted in a footnote in the *Barnett* case, where the Court drew an analogy to prosecutions for "petty offenses" which need not be by jury.[4] The prevailing opinion today seeks to buttress this distinction by reference to 18 U. S. C. § 1, which declares that an offense the penalty for which does not exceed six months is a petty offense. It studiously avoids embracing the view expressed by MR. JUSTICE HARLAN (*post*, at ——), that in no event does the Constitution require a jury trial for contempt. But I do not see any lines of constitutional dimension that separate contempt cases where the punishment is less than six months from those where the punishment exceeds that figure. That is a mechanical distinction—unsupported by our cases in either the contempt field or in the field of "petty offenses."

[4] The Court put the matter thus:

"However, our cases have indicated that, irrespective of the severity of the offense, the severity of the penalty imposed, a matter not raised in this certification, might entitle a defendant to the benefit of a jury trial. . . . In view of the impending contempt hearing, effective administration of justice requires that this *dictum* be added: Some members of the Court are of the view that, without regard to the seriousness of the offense, punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses." *Id.*, at 695, n. 12.

The difficulty with that analysis lies in attempting to define a petty offense merely by reference to the sentence actually imposed. This does not square with our decisions regarding the "petty offense" exception to the jury trial requirement. *First*, the determination of whether an offense is "petty" also requires an analysis of the nature of the offense itself; even though short sentences are fixed for a particular offense a jury trial will be constitutionally required if the offense is of a serious character. *Second*, to the extent that the penalty is revelant in this process of characterization, it is the *maximum potential* sentence, not the one actually imposed, which must be considered.

The notion that the trial of a petty offense could be conducted without a jury was first expounded by this Court in *Callan* v. *Wilson*, 127 U. S. 540 (1888).[5] The Court, "conceding that there is a class of petty or minor offences, not usually embraced in public criminal statutes, and not of the class or grade triable at common law by a jury," held that the offense charged—conspiracy—was not among them. *Id.*, at 555. In *Natal* v. *Louisiana*, 139 U. S. 621, the Court for the first time held a particular offense "petty." This was a local ordinance which forbade the operation of a private market within six squares of a public market. The maximum penalty was a $25 fine (or 30 days imprisonment in the event the fine was not paid).[6] And in *Schick* v. *United States*, 195

[5] The petty offense exception is treated in Frankfurter and Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv. L. Rev. 917 (1926). Their conclusion, long accepted in the decisions of this Court, that jury trials are not required in such cases is challenged in Kaye, Petty Offenders Have No Peers, 26 Chi. L. Rev. 245 (1959).

[6] This was, of course, not a case tried in the federal courts. But the Court did not decide the case on the ground that the Constitution does not require the States to afford jury trials in criminal cases; it took, instead, the narrower ground that this was a petty offense.

U. S. 65, the Court held that the knowing purchase of unstamped oleomargarine was a petty offense. The maximum penalty was a $50 fine.

None of these cases provides much guidance for those seeking to locate the line of demarcation between petty offenses and those more serious transgressions for which a jury trial is required. In *District of Columbia* v. *Colts*, 282 U. S. 63, the Court attempted to set out some general considerations. The offense was reckless driving at an excessive speed; the maximum punishment under the statute (for a first offender) was a $100 fine and 30 days in jail. Although the penalty was light, the Court thought the offense too serious to be regarded as "petty":

> "Whether a given offense is to be classed as a crime, so as to require a jury trial, or as a petty offense, triable summarily without a jury, depends primarily upon the nature of the offense. The offense here charged is not merely *malum prohibitum*, but in its very nature is *malum in se*. It was an indictable offense at common law . . . when horses, instead of gasoline, constituted the motive power . . . ." *Id.*, at 73.

The most recent case is *District of Columbia* v. *Clawans*, 300 U. S. 617, where the offense charged was that of engaging in a particular business without a license. The maximum penalty was $300 or 90 days in jail. Clawans was given a $300 fine but only 60 days in jail. The Court held that this was a "petty offense" and thus that no jury was required. The offense, the Court noted, was not a crime at common law; and today it is only an infringement of local police regulations, the offense being "relatively inoffensive." *Id.*, at 625. But, the Court added, "the severity of the penalty [is] an element to be considered." *Ibid.* Looking to the maximum penalty which might be imposed—90 days in

prison—the Court concluded that this was not so severe as to take the offense out of the category of "petty." Noting that in England, and even during this country's colonial period, sentences longer than 90 days were imposed without a jury trial, the Court assumed that penalties then thought mild "may come to be regarded as so harsh as to call for the jury trial." *Id.*, at 627. The Court added:

> "[W]e may doubt whether summary trial with punishment of more than six months' imprisonment, prescribed by some pre-Revolutionary statutes, is admissible without concluding that a penalty of ninety days is too much. Doubts must be resolved, not subjectively by recourse of the judge to his own sympathy and emotions, but by objective standards such as may be observed in the laws and practices of the community taken as a gauge of its social and ethical values." *Id.*, at 627–628.

Resolution of the question of whether a particular offense is or is not "petty" cannot be had by confining the inquiry to the length of sentence actually imposed. That is only one of many factors. As the analysis of the Court in *Clawans* demonstrates, the character of the offense itself must be considered. The relevance of the maximum possible sentence is that it may be "taken as a gauge of [the] social and ethical values" of the community. *Id.*, at 628. Had the potential sentence in the *Clawans* case been of considerable length, the Court presumably would have concluded that the legislative judgment—that long sentences were appropriate for violations of the licensing law—precluded treating the offense as "petty." But the converse is not always true: an offense the penalty for which is relatively light is not necessarily "petty," as *District of Columbia* v. *Colts*, *supra*, demonstrates.

The principal inquiry, then, relates to the character and gravity of the offense itself. Was it an indictable offense at common law? Is it *malum in se* or *malum prohibitum?* What stigma attaches to those convicted of committing the offense?[7] The *Barnett* dictum, though accepting the relevance of the petty offense cases, errs in assuming that these considerations are irrelevant.[8]

The dictum in *Barnett* errs, further, because it looks to the length of sentence *actually imposed*, rather than the potential sentence. The relevance of the sentence, as we have seen, is that it sheds light on the seriousness with which the community and the legislature regard the offense. Reference to the sentence actually imposed in a particular case cannot serve this purpose. It is presently impossible to refer to a "maximum" sentence for most contempts, for there is none; Congress has left such matters to the discretion of the federal courts.[9]

The offense of criminal contempt is, of course, really several diverse offenses all bearing a common name. Some involve conduct that violates courtroom decorum. At times the offender has insulted the court from a distance. Others are instances where an adamant witness

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[7] "Broadly speaking, acts were dealt with summarily which did not offend too deeply the moral purposes of the community, which were not too close to society's danger, and were stigmatized by punishment relatively light." Frankfurter and Corcoran, *supra*, at 980-981.

[8] "Some members of the Court are of the view that, *without regard to the seriousness of the offense*, punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses." 376 U. S., at 695. (Emphasis added.) To the extent that this merely reflects the *Clawans* principle that no offense which carries a substantial penalty can be "petty," the Court was correct. Yet, quite apart from the question of punishment, a jury trial is constitutionally required where the offense is of a serious character.

[9] 18 U. S. C. § 402 (1964 ed.).

refuses to testify. Still others, like the present case, involve disobedience of a court order directing parties to cease and desist from certain conduct pending an appeal. While some contempts are fairly minor affairs, others are serious indeed, deserving lengthy sentences. So long as all contempts are lumped together, the serious nature of some contempts and the severity of the sentences commonly imposed in such cases control the legal character of all contempts. None can be regarded as petty. Distinctions between contempts which, after the fact, draw a six-month or greater sentence and those which do not are based on constitutionally irrelevant factors and seem irrelevant to the analysis.

III.

The Constitution, as I see it, thus requires a trial by jury for the crime of criminal contempt, as it does for all other crimes. Should Congress wish it, an exception could be made for any designated class of contempts which, all factors considered, could truly be characterized as "petty." [10] Congress has not attempted to isolate and define "petty contempts." Do we have power to undertake the task of defining a class of petty contempts and to fix maximum punishments which might be imposed?

It would be a project more than faintly reminiscent of declaring "common-law crimes," a power which has

[10] Congress might, for example, determine that breaches of court decorum are generally of so minor a nature as to render it advisable to forego the possibility of any except minor penalties in favor of maintaining procedures for quick punishment (see Fed. Rules Crim. Proc. 42 (a); *Harris* v. *United States*, 382 U. S. 162) which are said to be necessary to achieve "summary vindication of the court's dignity and authority." *Cooke* v. *United States*, 267 U. S. 517, 534. This might be a class of "petty contempts" for which the maximum penalty would be slight and for which trial by jury would not be required. *Quaere*, whether imposition of a prison term would ever be consistent with a "petty" offense. Cf. Kaye, Petty Offenders Have No Peers, 26 Chi. L. Rev. 245, 275–277 (1959).

been denied the federal judiciary since the beginning of our republic. See *United States* v. *Hudson*, 7 Cranch 32; *United States* v. *Gradwell*, 243 U. S. 476, 485. It is, of course, true that in the *Hudson* case itself, the Court—while holding the judiciary powerless to exercise a common-law criminal jurisdiction—set contempt apart from this general restriction:

> "Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. But jurisdiction of crimes against the state is not among those powers. To fine for contempt—imprison for contumacy—inforce the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others: and so far our Courts no doubt possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common law cases we are of opinion is not within their implied powers." *Id.*, at 34.[11]

The Court today does not take that course. It does not undertake to classify different kinds of contempt in light of the nature and gravity of the offense. It permits the imposition of punishment without the benefit of a trial by jury in all contempt cases where the punishment does not exceed six months. For the reasons stated, I believe that course is wrong—dangerously wrong. Until the time when petty criminal contempts are properly defined and isolated from other species of contempts, I see no escape from the conclusion that punishment for all manner of criminal contempts can constitutionally be imposed only after a trial by jury.

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[11] And see 18 U. S. C. § 402, which allows "all other cases of contempt not specifically embraced in this section [to be] punished in conformity to the prevailing usages at law."